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1972 ANNOTATED

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User's Guide

In order to assist both the legal profession and the layman in obtaining the maximum benefit from the Mississippi Code of 1972 Annotated, a User's Guide has been included in the main volume. This guide contains comments and information on the many features found within the Code intended to increase the usefulness of the Code to the user.

PUBLISHER'S FOREWORD

Statutes

The 2012 Supplement to the Mississippi Code of 1972 Annotated reflects the statute law of Mississippi as amended by the Mississippi Legislature through the end of the 2012 Regular Session.

Annotations

Case annotations are included based on decisions of the State and federal courts in cases arising in Mississippi. Annotations to collateral research references are also included.

To better serve our customers by making our annotations more current, LexisNexis has changed the sources that are read to create annotations for this publication. Rather than waiting for cases to appear in printed reporters, we now read court decisions as they are released by the courts. A consequence of this more current reading of cases, as they are posted online on LexisNexis, is that the most recent cases annotated may not yet have print reporter citations. These will be provided, as they become available, through later publications.

This publication contains annotations taken from decisions of the Mississippi Supreme Court and the Court of Appeals and decisions of the appropriate federal courts. These cases will be printed in the following reporters:

Southern Reporter, 3rd Series
United States Supreme Court Reports
Supreme Court Reporter
United States Supreme Court Reports, Lawyers' Edition, 2nd Series
Federal Reporter, 3rd Series
Federal Supplement, 2nd Series
Federal Rules Decisions
Bankruptcy Reporter

Additionally, annotations have been taken from the following sources:

American Law Reports, 6th Series
American Law Reports, Federal Series
Mississippi College Law Review
Mississippi Law Journal

Finally, published opinions of the Attorney General and opinions of the Ethics Commission have been examined for annotations.

Amendment Notes

Amendment notes detail how the new legislation affects existing sections.

Editor's Notes

Editor's notes summarize subject matter and legislative history of repealed sections, provide information as to portions of legislative acts that have not been codified, or explain other pertinent information.

Joint Legislative Committee Notes

Joint Legislative Committee notes explain codification decisions and corrections of Code errors made by the Mississippi Joint Legislative Committee on Compilation, Revision, and Publication of Legislation.

Tables

The Statutory Tables volume adds tables showing disposition of legislative acts through the 2012 Regular Session.

Index

The comprehensive Index to the Mississippi Code of 1972 Annotated is replaced annually, and we welcome customer suggestions. The foreword to the Index explains our indexing principles, suggests guidelines for successful index research, and provides methods for contacting indexers.

Acknowledgements

The publisher wishes to acknowledge the cooperation and assistance rendered by the Mississippi Joint Legislative Committee on Compilation, Revision, and Publication of Legislation, as well as the offices of the Attorney General and Secretary of State, in the preparation of this supplement.

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September 2012 LexisNexis

SCHEDULE OF NEW SECTIONS

Added in this Supplement

TITLE 75. REGULATION OF TRADE, COMMERCE AND INVESTMENTS

CHAPTER 1. Uniform Commercial Code — Revised Article 1. General Provisions

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MISSISSIPPI CODE 1972

ANNOTATED

VOLUME SIXTEEN

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CHAPTER 1

Uniform Commercial Code — Revised Article 1. General Provisions

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Editor's Note — Section 44 of Chapter 506, Laws of 2010, effective July 1, 2010, repealed the sections formerly codified as Uniform Commercial Code Article 1, General Provisions [Chapter 1 of Title 75]. Section 3 of Chapter 506, Laws of 2010, enacted a revised Uniform Commercial Code Revised Article 1, General Provisions [Chapter 1 of Title 75], effective July 1, 2010.

The following tables of disposition list the provisions of UCC Article 1 as they existed prior to July 1, 2010, and the corresponding provisions in UCC Revised Article 1, effective July 1, 2010. These tables are intended to assist the user who is familiar with the former Article 1 in finding comparable new provisions in Revised Article 1. In addition, where appropriate, the Source lines from the former provisions have been retained in the new provisions.

Where appropriate, notes to judicial decisions have been moved from their location under former provisions to the comparable new provisions.

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75-1-108	75-1-105
75-1-109	75-1-107
75-1-110	None
75-1-201(1)-(20), (22)-(24), (28)-(30), (32)-(36), (38)-(40), (42)-(43) and (45)-(46)	75-1-201
75-1-201(21) ("honor"), (41)("telegram")	Omitted
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75-1-204(1)	75-1-302(b)
75-1-204(2), (3)	75-1-205
75-1-205	75-1-303
75-1-206	None
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75-1-102 (New)	No corresponding provision
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75-1-105	75-1-108
75-1-106	75-1-102(5)
75-1-107	75-1-109
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75-1-201	75-1-201(1)-(20), (22)-(24), (28)-(30), (32)-(36), (38)-(40), (42)-(43) and (45)-(46)
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75-1-307	75-1-202
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75-1-309	75-1-208

NEW ARTICLE 1
75-1-310

OLD ARTICLE 1
No corresponding provision

Part 1.

General Provisions.

Sec.

75-1-101. Short title.
75-1-102. Scope of article.
75-1-103. Construction of Uniform Commercial Code to promote its purposes and policies; applicability of supplemental principles of law.
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75-1-107. Section captions.
75-1-108. Relation to Electronic Signatures in Global and National Commerce Act.
75-1-109. Repealed.
75-1-110. Repealed.

§ 75-1-101. Short title.

(a) Chapters 1 through 10 of Title 75 shall be known and may be cited as the Uniform Commercial Code.

(b) This chapter may be cited as Article 1 when referring to the general provisions of the Uniform Commercial Code or as Uniform Commercial Code - General Provisions.

(c) Chapters 1 through 10 of Title 75 are numbered to correspond to the numbering of the articles of the Uniform Commercial Code and may be referred to as "Articles."

SOURCES: Present § 75-1-101 is derived from former § 75-1-101 [Codes, 1942, § 41A:1-101; Laws, 1966, ch. 316, § 1-101, eff March 31, 1968; Repealed by Laws, 2010, ch. 506, § 44, eff from and after July 1, 2010] and was enacted by Laws, 2010, ch. 506, § 3, eff from and after July 1, 2010.

JUDICIAL DECISIONS

I. UNDER CURRENT LAW.

1.-5. Reserved for future use.

II. UNDER FORMER § 75-1-101.

6. In general.

I. UNDER CURRENT LAW.

1.-5. Reserved for future use.

II. UNDER FORMER § 75-1-101.

6. In general.

Federal court made an Erie prediction that the Mississippi Supreme Court would extend the economic loss doctrine to sales transactions under the Uniform Commercial Code, as codified in Mississippi, Miss. Code Ann. § 75-1-101et seq., where there was no personal injury or property damage. Adcock v. S. Austin Marine, Inc., — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 104264 (S.D. Miss. Oct. 30, 2009).

In a contract case, the Uniform Commercial Code did not apply because under the mixed-transactions test the dispute clearly concerned testing of a control system owned by a utilities commission, which was a service; additionally, the contract as a whole, as evidenced by a demonstration that 60 percent of the contract

related to services, was for the specialized design of a turbine. Upchurch Plumbing, Inc. v. Greenwood Utils. Comm'n, 964 So. 2d 1100 (Miss. 2007).

The sales provision of the Code will be applied to situations involving other commercial contracts because although not controlled by the Code "the Code is persuasive here because it embodies the foremost modern legal thought concerning commercial transactions". Vitex Mfg. Corp. v. Caribtex Corp., 377 F.2d 795 (3d Cir. V.I. 1967).

Reference has been made to the Code in interpreting the effect of an "as is" sale of real estate, the court recognizing that the Code would not apply but pointing out that cases thereunder "by the process of reasoning by analogy are appropriate precedents to apply in an interpretation of the contract provision." Tibbitts v. Openshaw, 18 Utah 2d 442, 425 P.2d 160 (1967).

Because of the provision of UCC § 1-102(2) decisions in other states "are more than mere persuasive authority." A.J. Armstrong Co. v. Janburt Embroidery Corp., 97 N.J. Super. 246, 234 A.2d 737 (L. Div. 1967).

The court should seek to follow interpretations of the Code made in other states. A.J. Armstrong Co. v. Janburt Embroidery Corp., 97 N.J. Super. 246, 234 A.2d 737 (L. Div. 1967).

The UCC is inapplicable to commercial events which took place before it became effective. Streeter v. Middlemas, 240 Md. 169, 213 A.2d 471 (1965); Peachtree News Co. v. Macmillan Co., 112 Ga. App. 556, 145 S.E.2d 666, 3 U.C.C. Rep. Serv. 244 (1965).

A lease of standing timber for the purpose of producing turpentine therefrom is a lease of an interest in land to which the Uniform Commercial Code has no application. Newton v. Allen, 220 Ga. 681, 141 S.E.2d 417, 2 U.C.C. Rep. Serv. 770 (1965).

Moreover, notwithstanding that a transaction relating to the sale of goods was entered into after the enactment of the Uniform Commercial Code, the prior Uniform Sales Act governs where the transaction took place before the effective date of the Uniform Commercial Code. Paramount Paper Prods. Co. v. Lynch, 182 Pa. Super. 504, 128 A.2d 157 (1956).

An indictment made under a section of the Sales Act, which was repealed by the Uniform Commercial Code is valid where violation of a similar provision of the Uniform Commercial Code is punishable, since the legislature did not intend by the repeal of the Sales Act to grant a pardon to those committing offenses under it. Commonwealth v. Davis, 4 Pa. D. & C.2d 182 (1954).

The Uniform Commercial Code, as specifically provided therein, is inapplicable to transaction arising prior to its effective date. Thomas v. First Nat'l Bank, 376 Pa. 181, 101 A.2d 910 (1954); Roller v. Jaffe, 387 Pa. 501, 128 A.2d 355 (1957); Hahn v. Andrews, 182 Pa. Super. 338, 126 A.2d 519 (1956); GFC Corp. v. Antrim, 2 Pa. D. & C.2d 377 (1953); In re Consorto Constr. Co., 212 F.2d 676 (3d Cir. Pa. 1954), cert. denied, 348 U.S. 833, 75 S. Ct. 57, 99 L. Ed. 657 (1954); Gould v. City Bank & Trust Co., 213 F.2d 314 (4th Cir. Md. 1954); First Trust & Sav. Bank v. Fidelity-Philadelphia Trust Co., 214 F.2d 320, 50 A.L.R.2d 1218 (3d Cir. Pa. 1954), cert denied, 348 U.S. 856, 75 S. Ct. 81, 99 L. Ed. 674 (1954); Durkin v. Siegel, 340 Mass. 445, 165 N.E.2d 81 (1960); A. Belanger & Sons v. United States, 275 F.2d 372, 39 CCH Lab. Cas. P 66294 (1st Cir. Mass. 1960); United States ex rel. National U.S. Radiator Corp. v. D.C. Loveys Co., 174 F. Supp. 44, 37 Lab. Cas. (CCH) P 65620 (D. Mass. 1958), aff'd, 275 F.2d 372, 39 Lab. Cas. (CCH) P 66294 (1st Cir. Mass. 1960).

§ 75-1-102. Scope of article.

Article 1 applies to a transaction to the extent that it is governed by another article of the Uniform Commercial Code.

SOURCES: Former § 75-1-102 [Codes, 1942, § 41A:1-102; Laws, 1966, ch. 316, § 1-102, eff March 31, 1968; Repealed by Laws, 2010, ch. 506, § 44, eff from and

after July 1, 2010] is now found in comparable provisions enacted at §§ 75-1-103, 75-1-106 and 75-1-302 by Laws, 2010, ch. 506, § 3, eff from and after July 1, 2010. Present § 75-1-102 was enacted by Laws, 2010, ch. 506, § 3, eff from and after July 1, 2010.

§ 75-1-103. Construction of Uniform Commercial Code to promote its purposes and policies; applicability of supplemental principles of law.

(a) The Uniform Commercial Code must be liberally construed and applied to promote its underlying purposes and policies, which are:

(1) To simplify, clarify, and modernize the law governing commercial transactions;

(2) To permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and

(3) To make uniform the law among the various jurisdictions.

(b) Unless displaced by the particular provisions of the Uniform Commercial Code, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause supplement its provisions.

SOURCES: Present § 75-1-103 is derived from former §§ 75-1-102(1), (2) [Codes, 1942, § 41A:1-102; Laws, 1966, ch. 316, § 1-102, eff March 31, 1968; Repealed by Laws, 2010, ch. 506, § 44, eff from and after July 1, 2010] and 75-1-103 [Codes, 1942, § 41A:1-103; Laws, 1966, ch. 316, § 1-103, eff March 31, 1968; Repealed by Laws, 2010, ch. 506, § 44, eff from and after July 1, 2010], and was enacted by Laws, 2010, ch. 506, § 3, eff from and after July 1, 2010.

JUDICIAL DECISIONS

I. UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. UNDER FORMER § 75-1-102.

11. In general.
12. Nature and purpose.
13. Construction.
14. —Reference to official comments.
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II. UNDER FORMER § 75-1-103.

16. In general.
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28. —Secured transactions.
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30. Torts.

I. UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. UNDER FORMER § 75-1-102.

11. In general.

In action by insurer as subrogee of subcontractor for indemnification of claims settled by insurer, which claims arose out of fire in municipal filtration plant which started when spark from welding torch landed on defective plastic equipment supplied by defendant company to subcontractor for installation in plant, defense

contention that policy of UCC § 1-102(2)(b) to permit continued expansion of commercial practices through custom, usage, and agreement of parties demonstrated legislative intent to allow "commercial-industrial specialists," such as subcontractor and defendant in present case, to regulate relationships among themselves and determine liability for defective products by agreement, had no merit because party injured by defective product was remote user thereof. Potsdam Welding & Mach. Co. v. Neptune Microfloc, Inc., 57 A.D.2d 993 (3d Dep't 1977).

In action pursuant to UCC § 3-419 by co-payee of check for conversion of check by bank which cashed check with co-payee's endorsement forged by other payee, co-payee, which was not a "customer" of bank within meaning of UCC §§ 4-104 and 4-406, was not equitably estopped by policy of commercial reasonableness under UCC §§ 1-102 and 1-203, notwithstanding that co-payee waited 10 months after it learned of forgery to inform bank, where (1) check, which was issued to co-payee "and" other payee, was properly payable under UCC § 3-116 only if it contained endorsement of both payees; (2) unauthorized endorsement was, in absence of ratification under UCC § 3-404, no endorsement under UCC §§ 3-202 and 3-404; (3) co-payee did not ratify unauthorized endorsement; and (4) bank's failure to ascertain whether co-payee's signature was authorized was not in accord with reasonable commercial standards of banking business under UCC § 3-419. Atlas Bldg. Supply Co. v. First Indep. Bank, 15 Wash. App. 367, 550 P.2d 26 (1976).

Notwithstanding that agents of owner of counterfeit United States treasury bill inquired at bank as to genuineness of bill, such inquiry did not constitute notice under UCC § 1-201 (25, 26, 27) that bill was not genuine and bank, which took bill as negotiable instrument in bearer form under UCC § 8-105 as bona fide purchaser, was entitled under UCC § 8-306 to rely on owner's warranties as principal that bill was genuine and was not materially altered, but recovery by bank under unjust enrichment was not permitted, since, under UCC §§ 1-102 and 1-103, specific warranties of UCC displaced remedy of unjust enrichment in regard to negotiation of securities in this case. Brannon v. First Nat'l Bank, 137 Ga. App. 275, 223 S.E.2d 473 (1976).

12. Nature and purpose.

Where plaintiff former employer sued defendant former employee for breach of the implied duty of good faith and fair dealing, the claim was not likely to succeed on the merits for purposes of a preliminary injunction because there was no employment contract and although the employer cited Miss. Code Ann. § 75-1-203, under Miss. Code Ann. § 75-1-102, that only applied to the sale of goods. Block Corp. v. Nunez, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 34374 (N.D. Miss. Apr. 25, 2008).

While the effort was not totally successful, one of the purposes of the draftsmen of the Uniform Commercial Code was to eliminate resort to the concept of title in resolving controversies arising out of commercial transactions. J.L. Teel Co. v. Houston United Sales, Inc., 491 So. 2d 851 (Miss. 1986).

Provisions of Uniform Commercial Code could not be resorted to by students to support contention that university and its officers were bound by a standard of reasonableness in determining future tuition rates (see UCC § 1-102(2)). Eisele v. Ayers, 63 Ill. App. 3d 1039, 381 N.E.2d 21, 99 A.L.R.3d 876 (1st Dist. 1978).

UCC was designed to regulate commercial transactions, and legislature did not intend through Code to create contractual cause of action for wrongful death arising from breach of warranty. Geohagan v. GMC, 291 Ala. 167, 279 So. 2d 436 (Ala. 1973).

Taking note of the Uniform Commercial Code's purpose to "make uniform the law among the various jurisdictions", an Indiana Appeals Court held that electricity qualified as "goods" under the Code, relying upon the authority of a Pennsylvania case holding that natural gas was "goods" within the Code. Helvey v. Wabash County REMC, 151 Ind. App. 176, 278 N.E.2d 608, 48 A.L.R.3d 1055 (1972).

In matter of first impression in state, where there is authority in other jurisdictions, court will look to comments and

examples of drafters of legislation as guide to "promote its underlying purposes and policies". In re Rivet, 299 F. Supp. 374 (E.D. Mich. 1969).

The purpose of this act, to be liberally construed, is specified as the stipulation, clarification and modernization of the law governing commercial transactions to permit the continued expansion of commercial practices through custom, usage and agreement of the parties; and the statute mandates a liberal administration to the end that an aggrieved party may be put in as good a position as if the other party had fully performed without consequential, special, or penal damages unless specifically provided for. Chrysler Credit Corp. v. Sharp, 56 Misc. 2d 261 (1968).

The UCC was designed to bring the body of commercial law into the contemporary world of business. In re United Thrift Stores, Inc., 363 F.2d 11 (3d Cir. N.J. 1966).

The Massachusetts court regards the Uniform Commercial Code less as a novel enactment than as largely a restatement and clarification of existing law which has the approval of American scholars. Universal C.I.T. Credit Corp. v. Guaranty Bank & Trust Co., 161 F. Supp. 790 (D. Mass. 1958).

The Pennsylvania Uniform Commercial Code was enacted to codify all existing laws on commercial transactions. Girard Trust Corn Exch. Bank v. Warren Lepley Ford, Inc., 13 Pa. D. & C.2d 119 (1957).

13. Construction.

Exculpatory provision of assignment that conditional sale contract and judgment note assignor warranted compliance with all filing and recording requirements, agreeing that any filing or recording or renewals thereof which the assignee might undertake at assignor's request, or otherwise, should be at assignor's expense and without responsibility whatsoever on assignee's part for any omission or invalid accomplishment thereof, whether through assignee's failure, neglect, or for any other reason, and that such omission or invalid accomplishment should not relieve assignor of any responsibility to assignee, was void under UCC § 1-102(3). Congress Fin. Corp. v. Sterling-Coin Op Mach. Corp., 456 F.2d 451 (3d Cir. Pa. 1972).

The Article on letters of credit is to be liberally interpreted. The requirement of rigid adherence to material matters must strike a balance with the concept of reasonable flexibility as to minor matters in order to facilitate trade. Banco Espanol de Credito v. State St. Bank & Trust Co., 385 F.2d 230 (1st Cir. Mass. 1967), cert. denied, 390 U.S. 1013, 88 S. Ct. 1263, 20 L. Ed. 2d 163 (1968).

A court should not seek to restrict the Code by interpretations which preserve former inconsistent rules or law. Chrysler Credit Corp. v. Sharp, 56 Misc. 2d 261 (1968).

Where repurchase agreement executed by automobile dealer failed to establish the time for performance, evidence of custom and usage showing that bank must repossess and return car for purchase within 90 days after default was admissible to establish what was a reasonable time, and bank's undue delay in repossession and demand precluded it from recovering from automobile dealer the amount due from the buyer under the contract less the amount received at the execution sale. Valley Nat'l Bank v. Babylon Chrysler-Plymouth, Inc., 53 Misc. 2d 1029 (1967), aff'd, 28 A.D.2d 1092, 284 N.Y.S.2d 849 (2d Dep't 1967).

A liberal construction is to be placed upon the Commercial Code even to the extent of ignoring the requirement of § 9-402 that a financing statement is to be signed by the debtor, at least during the period of transition between the application of former statutes and the present Code. Alloway v. Stuart, 385 S.W.2d 41 (Ky. 1964).

The Code is to be liberally construed to promote its purposes and policies. National Shawmut Bank v. Vera, 352 Mass. 11, 223 N.E.2d 515, 4 U.C.C. Rep. Serv. 1 (1967); Annawan Mills, Inc. v. Northeastern Fibers Co., 26 Mass. App. Dec. 115, 4 U.C.C. Rep. Serv. 787 (1963).

A liberal construction must be given to the Uniform Commercial Code so as to secure a reasonable meaning and to effectuate the intention of its framers and make it workable and serviceable to the important business to which it relates.

Universal Lightning Rod, Inc. v. Rischall Elec. Co., 1 Conn. Cir. Ct. 623, 192 A.2d 50 (1963).

The Uniform Commercial Code is an attempt to codify all existing law governing commercial transactions and reference should not be made to one section alone. The Code must be considered as a whole, and each section should be read in conjunction with others in order to ascertain the intent of the legislature. Girard Trust Corn Exch. Bank v. Warren Lepley Ford, Inc., 12 Pa. D. & C.2d 351 (1957).

14. —Reference to official comments.

The official comments to the Code may be examined to determine the intent of the Code, but in case of conflict with the provisions of the Code, the latter prevails. Bafile v. Remchow & Ford Motor Co., 58 Schuyl. L. Rec. 108 (Pa. 1962).

15. Policy of uniformity.

Virginia case law holding that extrinsic evidence may not be received to explain or supplement a written contract unless the court finds the writing is ambiguous has been changed by the UCC provision that the Code shall be liberally construed and applied to promote its underlying purposes and policies which include the continued expansion of commercial practices through custom, usage and agreement of the parties, and a finding of ambiguity is not necessary for the admission of extrinsic evidence about the usages of the trade and the parties' course of dealing. Columbia Nitrogen Corp. v. Royster Co., 451 F.2d 3 (4th Cir. Va. 1971).

Policy of uniformity utilized by court in adhering to Pennsylvania statute of limitations construction in Ohio case of first impression. Val Decker Packing Co. v. Corn Prods. Sales Co., 23 Ohio Misc. 162, 411 F.2d 850 (6th Cir. Ohio 1969).

In matter of first impression in state, where there is authority in other jurisdictions, court will look to comments and examples of drafters of legislation as guide to "promote its underlying purposes and policies". In re Rivet, 299 F. Supp. 374 (E.D. Mich. 1969).

In Franklin Nat. Bank v. Eurez Constr. Corp. (1969) 60 Misc 2d 499, 301 NYS2d 845, 6 UCCRS 634, directive of Code that it be liberally construed to promote its purposes and policies, one of which is "to make uniform the law among the various jurisdictions", was utilized by court in relying on cases from other jurisdictions holding that one who is not holder in due course but takes accommodation paper for value before it is due may enforce it against the accommodation maker, and that want of consideration is no defense to accommodation maker. Franklin Nat'l Bank v. Eurez Constr. Corp., 60 Misc. 2d 499 (1969).

Because policy of Code is uniformity, sister-state interpretations are more than mere persuasive authority. A.J. Armstrong Co. v. Janburt Embroidery Corp., 97 N.J. Super. 246, 234 A.2d 737 (L. Div. 1967).

II. UNDER FORMER § 75-1-103.

16. In general.

Under principle that pre-UCC law is applicable unless displaced by particular provisions of Code, UCC statute of frauds, rather than general statute of frauds, applies to alleged oral agreement and subsequent confirmatory letter, where general statute of frauds and UCC provision are in conflict and mandate different results. H & W Indus., Inc. v. Formosa Plastics Corp., USA, 860 F.2d 172 (5th Cir. 1988), reh'g denied, 863 F.2d 882 (5th Cir. 1988).

Finding no UCC Article 2 guidance to determining lessor's measure of recovery for lessee's continued use of leased copier after revocation, court would turn to doctrine of quantum meruit, which was not replaced by UCC. J.L. Teel Co. v. Houston United Sales, Inc., 491 So. 2d 851 (Miss. 1986).

Nowhere does the Uniform Commercial Code state in so many words that a bank, whether a collecting bank or payor bank, is liable for negligently paying an item. Hints, however abound in the Code. They start with § 1-103, providing that common-law rules of negligence still apply. Section 3-419(3) limits recovery against collecting banks for conversion only if they acted in good faith and followed "reasonable commercial standards." Section 3-406 precludes assertion of a material alteration or unauthorized signature against the party whose negligence substantially contributed to the wrongdoing, but only if

the payor is a holder in due course or paid "in good faith and in accordance with the reasonable commercial standards of the drawee's or payor's business." A bank is prohibited from disclaiming "responsibility for its own lack of good faith or failure to exercise ordinary care" under § 4-103(1), apparently on the assumption that such duties exist. Finally, a bank's lack of care shifts the burden for paying over a forged signature or a materially altered item from its customer, who was negligent in discovering the wrongdoing, back to the bank under § 4-406(3). Bank of S. Md. v. Robertson's Crab House, Inc., 39 Md. App. 707, 389 A.2d 388 (1978).

Since the Uniform Commercial Code does not deal with the attributes of ownership of a joint tenant in investment securities, the court under UCC § 1-103 may apply the applicable common-law principles that govern joint tenancies. Ogilvie v. Idaho Bank & Trust Co., 99 Idaho 361, 582 P.2d 215 (1978).

Under UCC § 1-103, the provisions of the Uniform Commercial Code do not totally preempt the fields of law in which they speak. Rather, they are supplemented by all principles of law and equity that they do not specifically displace. S.S. Kresge Co. v. Port of Longview, 18 Wash. App. 805, 573 P.2d 1336 (1977), review granted, 90 Wash. 2d 1004 (1978).

UCC § 1-103 is to be viewed as a general adoption of commonlaw principles to commercial transactions, where the Code provisions do not apply to replace them. Gorge Lumber Co. v. Brazier Lumber Co., 6 Wash. App. 327, 493 P.2d 782 (1972).

UCC § 1-103 explicitly provides that previously recognized principles of law and equity should supplement statute in those areas where Code is silent. Muir v. Jefferson Credit Corp., 108 N.J. Super. 586, 262 A.2d 33 (L. Div. 1970).

The instant section affords a basis for regarding the Code as being supplemented by existing law outside the Code unless displaced by provisions of the Code itself. National Shawmut Bank v. Vera, 352 Mass. 11, 223 N.E.2d 515 (1967).

The provisions of this section superimpose a general requirement of fundamental integrity on commercial transactions regulated by the Uniform Commercial Code. Skeels v. Universal C.I.T. Credit Corp., 335 F.2d 846 (3d Cir. Pa. 1964).

17. Agency.

Although written notice of termination of authority to execute instruments would be desirable and even though checking account agreement between corporation and bank required revocation of signatory authority to be in form of written corporate resolution, controverted question of fact as to whether bank received oral notice of withdrawal of signatory authorization presented material issue of fact which would ordinarily preclude summary judgment, since under UCC § 4-103, no agreement can disclaim bank's responsibility for its own lack of good faith or failure to exercise ordinary care, and since, under UCC § 1-103, general rule of principal and agent that notice of termination of agent's authority can be given orally was applicable in absence of specific UCC provision on point. First Piedmont Bank & Trust Co. v. Doyle, 97 Idaho 700, 551 P.2d 1336 (1976), overruled on other grounds, 101 Idaho 852, 623 P.2d 464 (1980).

Case law rule that, if bank knows that deposits by debtor in his own name are in fact held by him in fiduciary capacity, then bank may not apply such funds to individual indebtedness of debtor, was not nullified by adoption of Uniform Commercial Code. South Cent. Livestock Dealers, Inc. v. Security State Bank, 551 F.2d 1346 (5th Cir. Tex. 1977).

The rules of law governing the ratification of the acts of an agent are not altered by the Code. In re Eton Furn. Co., 286 F.2d 93 (3d Cir. Pa. 1961).

Whether a person is the agent of the seller so that he has authority to bind the seller by a warranty, charge the seller with notice of a particular purpose for which the goods are desired by the buyer, or charge the seller with notice of nonconformity of the goods, is a question of fact to be determined by the jury when the evidence is conflicting. Marble Card Elec. Corp. v. Maxwell Dynamometer Co., 10 Chest. Co. 145 (Pa. 1961).

18. Contracts.

In an action arising out of an accommodation endorsement by a decedent on a

negotiable instrument which represented a consolidation and renewal of two outstanding notes owed by his son, the finding of the chancellor that the decedent, although in poor health and suffering from very poor vision, had been competent when he endorsed the note two weeks before his death was supported by the evidence and was free from manifest error. Wilson v. Planters Bank, 383 So. 2d 1089 (Miss. 1980).

An infant may not disaffirm a contract for necessaries (UCC § 1-103, successor provision to Pers Prop L § 83). Even here, the phrase "necessaries" does not possess a fixed interpretation, but must be measured against both the infant's standard of living and the ability and willingness of his guardian, if he has one, to supply the needed services or articles. Fisher v. Cattani, 53 Misc. 2d 221 (1966).

A person is bound by a contract which he signs without reading it when there is no evidence that he could not have done so had he chosen. Garner v. Tomcavage, 34 Northumb. Legal J. 18 (Pa. 1962).

The Code does not change the fundamental principle of contract law that where the parties have merely made a tentative agreement and in fact have not agreed upon any contract there is no binding obligation which the court can enforce. Arcuri v. Weiss, 198 Pa. Super. 506, 184 A.2d 24 (1962).

19. —Parol evidence rule.

Since it was well established prior to enactment of Uniform Commercial Code that if fraud were alleged with respect to formation of written contract, parol evidence rule did not bar consideration of contemporaneous oral agreement, and since UCC § 1-103 expressly provides that common-law principles of fraud and misrepresentation supplement Uniform Commercial Code's provisions, courts have continued to recognize pre-UCC fraud exception to parol evidence rule after adoption of parol evidence rule set forth in UCC § 2-202. Thus, in action by buyer of front-end loader to recover damages caused by fraudulent misrepresentations of seller's employee, chancellor was required to consider testimony by buyer-even though parties' written contract specifically declared that it was complete and exclusive statement of terms of their agreement (see UCC § 2-202(b))-that loader, although represented as being 1973 model, was in fact manufactured in 1968. Franklin v. Lovitt Equip. Co., 420 So. 2d 1370 (Miss. 1982).

Under Pennsylvania law where parties, without any fraud or mistake, have deliberately put their engagements in writing, the writing is not only the best, but the only, evidence of their agreement. Associated Hdwe. Supply Co. v. Big Wheel Distrib. Co., 355 F.2d 114, 17 A.L.R.3d 998 (3d Cir. Pa. 1965).

As provided in § 1-103, it was settled law in Pennsylvania prior to enactment of the Uniform Commercial Code that where fraud, accident, or mistake are alleged with respect to the execution of a written contract, prior oral agreements between the parties are admissible. Associated Hdwe. Supply Co. v. Big Wheel Distrib. Co., 355 F.2d 114, 17 A.L.R.3d 998 (3d Cir. Pa. 1965).

In action to determine priority of security interests of bank and seller of hardware store, where evidence showed that seller's security interest in purchaser's collateral was perfected by filing on July 20, 1972, and that bank's interest in same collateral was perfected by filing on November 2, 1972; that bank, by subordination agreement entered into on July 12, 1972, had subordinated its claim against purchaser to claim of seller; and that on December 11, 1973, rider to subordination agreement executed by bank, seller, and purchaser provided that agreement should apply only to first $15,000 of purchaser's indebtedness to seller and that priority of claims concerning remainder of such indebtedness should be determined in accordance with UCC Article 9, (1) provisions of UCC Article 1 applied to case, since subordination agreement and rider related to transactions covered by Uniform Commercial Code and rider specifically referred to Article 9; (2) under UCC § 1-103, dealing with application of supplementary principles of law and equity, non-UCC parol evidence rule applied to case; (3) under UCC § 1-205(4), non-UCC parol evidence rule barred parol evidence by bank that rider was intended to grant bank priority as to claims in excess

of first $15,000 of purchaser's indebtedness to seller, since such evidence was totally inconsistent with unambiguous terms of rider which were controlling; and (4) even if seller's security interest should fail to meet test for special priority under UCC § 9-312(3), seller's interest would still prevail under first-to-file rule of UCC § 9-312(5). Peoples Bank & Trust v. Reiff, 256 N.W.2d 336 (N.D. 1977).

20. Contribution and indemnity.

In action for seller's breach of contract to sell and install at buyer's lumber plant two "super drying kilns" and two lumber-handling systems, where (1) contract contained performance guarantee that super kilns would reduce drying schedules for buyer's lumber by 50 per cent and that if they did not do so, seller would provide adequate production capacity equal to that of four conventional dry kilns at no additional cost to buyer, (2) buyer paid down payment of $24,000, which was accepted by seller, (3) seller repudiated contract because it could not comply with performance guarantee, and (4) buyer thereafter purchased four conventional dry kilns and also a lumber "stacker-unstacker" from another seller, court held (1) that contract's performance guarantee was sufficiently definite and certain, (2) that because contract was breached by seller before installation of super kilns, liquidated damages provision of performance guarantee was inapplicable to measure buyer's damages and district court should have measured such damages under UCC §§ 2-712 and 2-713, (3) that regardless of whether district court, on remand of case, should apply cover provisions of UCC § 2-712 or contract-market price damages rule of UCC § 2-713 to case, court should base either cost of cover or market price of dry kilns on installed cost of conventional dry kilns with holding capacity twice that of the super kilns contracted for, since parties intended, by their performance guarantee, that super kilns' productivity was to be equivalent of conventional dry kilns with twice the holding capacity of such kilns, (4) that under UCC § 2-711(1), buyer was entitled to recover its down payment, (5) that since the Uniform Commercial Code did not provide remedy for seller's recovery of value of equipment shipped by seller to buyer before seller's breach of contract, UCC § 1-103 was applicable and seller, under common-law and equitable principles, was entitled to recover value of equipment still in buyer's possession, together with fair value of equipment that buyer had disposed of, and (6) that district court should compute under UCC § 2-713 damages caused buyer by seller's failure to deliver and install the lumber-handling systems. Mann & Parker Lumber Co. v. Wel-Dri, 579 F.2d 973 (6th Cir. Tenn. 1978).

Under UCC § 1-103, general law on contribution and indemnity continues to supplement provisions of UCC and was applicable in truck owner's action for breach of warranty against dealer and manufacturer of truck to recover amount paid out in settlement of lawsuits arising out of collision between automobile and truck. Dodge Trucks, Inc. v. Wilson, 140 Ga. App. 743, 231 S.E.2d 818 (1976), aff'd, 238 Ga. 636, 235 S.E.2d 142 (1977).

By its terms, UCC § 1-103 permits reference to general equity principles only if they are not "displaced by the particular provisions of this Act;" the "Act" is the entire Code. Bowling Green, Inc. v. State St. Bank & Trust Co., 307 F. Supp. 648 (D. Mass. 1969), aff'd, 425 F.2d 81 (1st Cir. Mass. 1970), but see, Maine Family Fed. Credit Union v. Sun Life Assurance Co., 727 A.2d 335 (Me. 1999).

21. Equity.

Notwithstanding Idaho statutory and common-law principles concerning gifts and the creation of joint tenancies, transfers of investment securities are governed by Article 8 of the Idaho Uniform Commercial Code (UCC §§ 8-101 et seq). However, where Article 8 is silent as to the applicable law, the Idaho court's disposition of a transfer of such securities, under Idaho UCC § 1-103, is governed by principles of law and equity that supplement the provisions of the Idaho Uniform Commercial Code. Ogilvie v. Idaho Bank & Trust Co., 99 Idaho 361, 582 P.2d 215 (1978).

Equitable principles continued to apply to permit a seller to recover from a third party the sales price of automobiles as represented by checks issued by the pur-

chaser with every intention that they would be paid upon presentment, and this despite the seller's loss of the right of rescission, where it was the act of the third party which rendered the purchaser's checks worthless to that party's financial advantage. Greater Louisville Auto Auction, Inc. v. Ogle Buick, Inc., 387 S.W.2d 17 (Ky. 1965).

22. —Constructive trust.

Where (1) plaintiff and his wife purchased used mobile home, (2) plaintiff's father-in-law cosigned security agreement and note as accommodation maker, (3) plaintiff defaulted on payments, (4) plaintiff's father-in-law, with secured party's consent, obtained possession of home, paid off balance due on note, and made repairs on home, (5) secured party obtained repossession title in its name, released security agreement, and transferred repossession title to plaintiff's father-in-law without notifying plaintiff, who was in jail, of either the account delinquency or the subsequent transfer of title, and (6) after plaintiff's release from jail, plaintiff's father-in-law sold home with plaintiff's consent, but did not give accounting of sale or proceeds therefrom to plaintiff, court held (1) that plaintiff did not waive right to notice of disposition of home under UCC § 9-504(3), since UCC § 9-501(3)(b) specifically states that such right cannot be waived; (2) plaintiff's father-in-law, as accommodation maker of note, did not fall within scope of UCC § 9-504(5), dealing with transfers of collateral that are not sales and thus do not require notice to debtor; (3) UCC § 9-504(5) did not contemplate complete extinguishment of plaintiff's right to home, as was done in present case by secured party's transfer of repossession title to plaintiff's father-in-law; and (4) under UCC § 9-507(1) and UCC § 1-103, plaintiff was entitled to damages for conversion of home on basis of benefit to defendant wrongdoers, rather than on basis of allowing full value of home as enhanced by wrongdoers. Western Nat'l Bank v. Harrison, 577 P.2d 635, 23 U.C.C. Rep. Serv. 1383 (Wyo. 1978) (stating, alternatively, that once plaintiff had established conversion of home and consequential right to nominal damages therefor, he became eligible for rule-of-thumb damages allowed by UCC § 9-507(1).

23. —Estoppel and waiver.

Failure of customer to give prior consent, as required by Florida UCC § 5-106(2), to extension of irrevocable letter of credit did not invalidate such extension where customer acquiesced in extended letter after its issuance. In such case customer, under general principles of equity incorporated into Florida Uniform Commercial Code by Florida UCC § 1-103, was estopped from denying that it was bound by the extended letter. Lewis State Bank v. Advance Mtg. Corp., 362 So. 2d 406, 25 U.C.C. Rep. Serv. 245 (Fla. App. 1978) (holding that letter of credit in suit remained irrevocable and unconditional within meaning of Florida UCC § 5-103(1)(a)).

Under Illinois law some "title" or "right" can be created by estoppel. Avco Delta Corp. Canada v. United States, 459 F.2d 436 (7th Cir. Ill. 1972).

An agreement between an equipment manufacturer and a finance company to the effect that the finance company was under no responsibility to record or file security paper was deemed waived by the finance company's retention of, and inaction upon, a letter from the manufacturer accompanying its transmittal of a conditional sales contract and judgment note requesting the finance company to record the paper, and the finance company's failure to comply with the statute placed the burden of loss from the dissipation of the security upon its shoulders. Congress Fin. Corp. v. Sterling-Coin Op Mach. Corp., 456 F.2d 451 (3d Cir. Pa. 1972).

Defense of estoppel to ameliorate what would otherwise be an equitable result, a doctrine adopted and applied under New York decisional law, was properly raised as an affirmative defense in accordance with the Federal Rules, because of the directive of UCC § 1-103 for the preservation of principles of law and equity. Congress Factors v. Malden Mills, Inc., 332 F. Supp. 1384 (D.N.J. 1971).

Although UCC § 1-103 allows principle of estoppel to supplement UCC provisions, grain farmer was not estopped from asserting statute of frauds, UCC § 2-201, as defense to alleged oral contract for sale of

40,000 bushels of grain where there was no evidence of fraud, positive misrepresentation or unconscionable conduct akin to fraud chargeable to farmer. Farmers Coop. Ass'n v. Cole, 239 N.W.2d 808 (N.D. 1976).

In action by buyer against seller arising out of nondelivery of wheat under oral sales contract, original oral contract was not rendered unenforceable by UCC § 2-201 statute of frauds, where seller admitted existence of contract. Nor was oral modification of contract as to delivery date due to unavailability of elevator space rendered unenforceable by statute of frauds requirement under UCC §§ 2-209 and 2-201 where pursuant to UCC § 1-103 and 2-209, seller waived statute of frauds defense through his course of performance under UCC § 2-208 and 1-205 in delivering 36 truckloads of wheat well after original delivery date without making timely objection. Farmers Elevator Co. v. Anderson, 170 Mont. 175, 552 P.2d 63 (1976).

In action by buyer to enforce oral contract for sale of 20,000 bushels of corn at $1.22 per bushel for future delivery, seller was barred from raising defense of statute of fraud, UCC § 2-201(1) by doctrine of equitable estoppel where buyer substantially changed its position in reliance on oral contract by selling 18,000 bushels of corn to two third parties in accordance with buyer's general business practice, and where seller knew or should have known that buyer would rely on contract and would resell corn. Farmers Elevator Co. v. Lyle, 90 S.D. 86, 238 N.W.2d 290 (1976).

Bank's action in converting a transaction which clearly contemplated insurance, into an assignment which would have the effect of depriving the buyer of the waiver of subrogation provision, was not "good faith" as defined by UCC. Integrity Ins. Co. v. Davis, 116 N.J. Super. 417, 282 A.2d 452 (1971).

No particular provision of Code displacing law of waiver, supplementary general principles of law were applicable in this regard under Code § 1-103. Clovis Nat'l Bank v. Thomas, 77 N.M. 554, 425 P.2d 726, 4 U.C.C. Rep. Serv. 137 (1967) (premise of no Code displacement of law of waiver expressly disagreed with by United States v. Greenwich Mill & Elevator Co. (1968, ND Ohio) 291 F Supp 609, 17 Ohio Misc 71, 46 Ohio Ops 2d 102, 5 UCCRS 965 (applying Ohio law) and holding that Code § 9-306(2) codified doctrine of waiver).

When one of two innocent persons must suffer through the fraud of a third person the one who made it possible for the fraud to be perpetrated must bear the loss. GMAC v. Manheim Auto Auction, 25 Pa. D. & C.2d 179 (1961).

24. —Subrogation.

Surety's right of subrogation is not displaced by Article 9 of Code. National Shawmut Bank v. New Amsterdam Cas. Co., 411 F.2d 843 (1st Cir. Mass. 1969).

Where (1) purchaser of truck, who was in default on loan made by first secured creditor, borrowed money from second secured creditor to pay off first creditor's loan, (2) first creditor's lien on truck was then discharged of record, (3) second creditor, although it obtained note and security agreement covering truck, which instruments were executed on behalf of corporation of which debtor was officer, neglected (a) to effect transfer of truck's title to debtor's corporation, (b) to perfect security interest in truck by recording its lien on vehicle's title document, and (c) to record such title document with Director of Motor Vehicles, (4) debtor's corporation became insolvent, and receiver was appointed therefor, and (5) truck was sold at judicial sale, and receiver claimed that his interest in sale proceeds had priority over second secured creditor's lien on truck, court held (1) that under UCC § 9-301(1)(b) and (3), providing that unperfected security interest is subordinate to rights of one who becomes "lien creditor" without knowledge of such security interest and before it is perfected, receiver of debtor's corporation had apparent priority as a "lien creditor" because second creditor's unperfected lien on truck would yield to receiver's priority as "lien creditor" who had no knowledge of second creditor's lien, in absence of any evidence that creditors represented by receiver had any such knowledge themselves, (2) that despite receiver's apparent priority, the Uniform Commercial Code, under UCC § 1-103, is

supplemented by principles of law and equity unless such principles are displaced by any provision of the code, (3) that no particular provision of UCC Article 9 had displaced the doctrine of equitable subrogation where such doctrine was properly invocable as a matter of substantive law, and (4) that under all circumstances of case, second creditor's contention that it was entitled to be subrogated to first creditor's recorded lien before such lien was discharged, on the ground that second creditor's money was used to pay off such prior lien, should be sustained. Kaplan v. Walker, 164 N.J. Super. 130, 395 A.2d 897 (App. Div. 1978).

Terms of Uniform Commercial Code do not abrogate, modify, affect or abridge performing surety's rights under equitable doctrine of subrogation, and subrogation claim thereunder does not lose its priority rank when it is not filed pursuant to requirements of Code. Mid-Continent Cas. Co. v. First Nat'l Bank & Trust Co., 531 P.2d 1370 (Okla. 1975).

Doctrine of equitable subrogation in suretyship cases has not been affected by adoption of Uniform Commercial Code. In re J.V. Gleason Co., 452 F.2d 1219 (8th Cir. Minn. 1971).

Silence of Uniform Commercial Code on subject of subrogation and equitable liens created thereby indicates an intentional recognition of and a desire to preserve the doctrine of equitable subrogation. In re J.V. Gleason Co., 452 F.2d 1219 (8th Cir. Minn. 1971).

Where there are two security interests in the same collateral and a third person pays the debt of the debtor to the holder of the prior interest, the third person, despite the fact that he did not take an assignment of the prior interest would, on principles of subrogation, succeed to the rights or the holder of the prior interest provided that the interest of the intervening lienor was not prejudicially affected. This principle of subrogation is not superseded by the Uniform Commercial Code which provides in the instant section that unless displaced by the particular provisions of the Code, the principles of law and equity "shall supplement its provisions" because no provision of the Code purports to affect the fundamental doctrine of subrogation. French Lumber Co. v. Commercial Realty & Fin. Co., 346 Mass. 716, 195 N.E.2d 507 (1964).

25. —Unjust enrichment.

Notwithstanding that agents of owner of counterfeit United States treasury bill inquired at bank as to genuineness of bill, such inquiry did not constitute notice under UCC § 1-201 (25, 26, 27) that bill was not genuine and bank, which took bill as negotiable instrument in bearer form under UCC § 8-105 as bona fide purchaser, was entitled under UCC § 8-306 to rely on owner's warranties as principal that bill was genuine and was not materially altered, but recovery by bank under unjust enrichment was not permitted, since, under UCC §§ 1-102 and 1-103, specific warranties of UCC displaced remedy of unjust enrichment in regard to negotiation of securities in this case. Brannon v. First Nat'l Bank, 137 Ga. App. 275, 223 S.E.2d 473 (1976).

Equitable principles, which supplement Code's provisions, demand that buyer seeking cancellation on grounds of misrepresentation should return what he has received. Melms v. Mitchell, 266 Or. 208, 512 P.2d 1336, 65 A.L.R.3d 376 (1973).

26. Law merchant; commercial paper.

Where third person purchased money order for $286 from defendant bank, gave it to plaintiff to obtain release of automobile on which plaintiff had lien for towing and storage charges, immediately returned to defendant bank and ordered that payment be stopped on such money order, and was refunded purchase price thereof, bank in action by plaintiff was liable for face amount of such order, even though money orders are not specifically provided for in the Uniform Commercial Code. Under UCC § 1-103, court would apply law-merchant principle concerning money orders and enforce meaning given by merchants to such orders when issued by bank that person who purchases money order is authorized to bind bank's credit to limit stated in order, and in present case money order issued by defendant stated that it was "not valid over $1,000." Mirabile v. Udoh, 92 Misc. 2d 168, 23 U.C.C. Rep. Serv. 101 (1977) (stating that phrase "not valid over $1,000" was

concession by bank that purchaser of money order had authority to bind bank's credit to that amount).

Pre-Code rule that one who receives before maturity note signed by maker for accommodation of another is not affected by mere fact that it was made without consideration, continues under Code. Franklin Nat'l Bank v. Eurez Constr. Corp., 60 Misc. 2d 499 (1969).

A provision in commercial paper for costs and expenses if "legal proceedings be instituted," is to be interpreted according to the general contract law principles as there is nothing in the Code which displaces such principles. Bryant v. Bowles, 108 N.H. 315, 234 A.2d 534 (1967).

Whether a note is usurious is determined by general principles and statutes and not by the Code. Cooper v. Cherokee Village Dev. Co., 236 Ark. 37, 364 S.W.2d 158, 1 U.C.C. Rep. Serv. 440 (1963); Pioneer Credit Corp. v. Radding, 149 Conn. 157, 176 A.2d 560 (1961).

27. —Sales.

In action for breach of warranty and fraud on part of sellers in sale of bull, buyer's remedies were not limited under UCC § 719(1)(b) by paragraph in sales agreement which provided for buyers' remedy in event bull died, since (1) there was no provision that paragraph provided exclusive remedy and (2) contract clause limiting liability would not be applied in fraud action. Lamb v. Bangart, 525 P.2d 602 (Utah 1974).

No particular provisions of the Uniform Commercial Code displaced statute [Massachusetts G.L. c. 259, § 6] making void certain sales of stock not owned by sellers. Colt v. Fradkin, 361 Mass. 447, 281 N.E.2d 213 (1972).

The Uniform Commercial Code does not change the rule that a vendor cannot rescind and reclaim the goods as against an attachment or execution on a debt contracted subsequent to the alleged voidable sale. In re Kravitz, 278 F.2d 820 (3d Cir. Pa. 1960).

28. —Secured transactions.

Although principles of estoppel and good faith underlie entire UCC, including provisions of Article 9, and lack of good faith on part of secured creditor may alter priorities which would otherwise be determined by Article 9 provisions, mere fact that secured party stood to gain from debtors' wrongful conduct did not in and of itself show lack of good faith and fact that secured party authorized debtors to purchase grain on credit from third party did not constitute evidence of fraudulent scheme or conspiracy. Central Soya Co. v. Bundrick, 137 Ga. App. 63, 222 S.E.2d 852 (1975).

Where defendant bank made loan to debtor under name "Lee Anderson," took security agreement on new automobile which was properly filed in county clerk's office and indexed under name of "Lee Anderson," but did not examine manufacturer's statement of origin, issued earlier to James Anderson, and took no steps to assure itself that car's title papers would be issued in name of Lee Anderson, where debtor applied for and received certificate of title in name of "James L. Anderson," and where plaintiff bank also made loan to debtor, as "James L. Anderson," taking and filing security agreement covering same automobile after checking with county clerk's office and determining that no prior liens on automobile had been filed against James L. Anderson, defendant bank's failure to file its lien in name shown on certificate of title was responsible for plaintiff bank's later determination, justified by lien records of county clerk, that there was no prior lien on record against automobile owned by James L. Anderson, and thus plaintiff bank's lien was entitled to priority over defendant bank's lien, although defendant bank was guilty of no intentional wrong and did all that was required by applicable provisions of UCC in taking and filing its security agreement. Central Nat'l Bank & Trust Co. v. Community Bank & Trust Co., 528 P.2d 710 (1974).

Since Kentucky Commercial Code did not contain any provision defining the relative priorities of a creditor as against a reclaiming seller, the court would turn to relevant common law of Kentucky for the needed answer. In re Mel Golde Shoes, Inc., 403 F.2d 658 (6th Cir. Ky. 1968).

The principle that a reclamation seller's interest is subordinate to that of a lien creditor who extended credit subsequent

to the sale is not displaced by the particular provisions of § 2-702. In re Kravitz, 278 F.2d 820 (3d Cir. Pa. 1960).

29. Statute of limitations.

Since there is no special statute of limitations set forth in Commercial Code, three-year statute of limitations in Code of Civil Procedure was applicable to action for alleged conversion of negotiable instrument. Bank of Am. Nat'l Trust & Sav. Ass'n v. Security Pac. Nat'l Bank, 23 Cal. App. 3d 638 (5th Dist. 1972).

30. Torts.

Bank is not liable for dishonored check, under either common law negligence theory or common law negligent misrepresentation theory, where check is presented to bank customer by buyer of customer's business, during closing held on premises of bank, bank officer present at closing asks customer to step outside room for moment, asks customer what he thinks about check, customer responds that he knows nothing about check, banker states that check looks all right, and customer does not ask banker to have check verified nor does banker volunteer to do so. White v. Hancock Bank, 477 So. 2d 265 (Miss. 1985).

Liability of port as bailee for common-law negligence, as codified by UCC § 7-204(1), for damage to bailor's goods caused by collapse of roof of port's warehouse was supplemented, under UCC § 1-103, by doctrine of strict vicarious liability in tort only to extent that port would be liable for acts of independent contractor over whom port had right of control. S.S. Kresge Co. v. Port of Longview, 18 Wash. App. 805, 573 P.2d 1336 (1977), review granted, 90 Wash. 2d 1004 (1978).

RESEARCH REFERENCES

ALR. Custom or usage as affecting time within which buyer must make inspection, trial, or test to determine whether goods are of requisite quality. 52 A.L.R.2d 925.

Am Jur. 11 Am. Jur. 2d, Bills and Notes §§ 6, 19.

15A Am. Jur. 2d, Commercial Code §§ 1, 2, 15, 17, 30.

73 Am. Jur. 2d, Statutes §§ 72 et seq., 145, 153, 154, 179 et seq.

Instruction to jury; right to vary code provisions by agreement, 6 Am. Jur. Pl & Pr Forms (Rev ed), Bank Deposits and Collections, Form 4:33.

Instruction to jury; liberal administration of remedies, 6 Am. Jur. Pl & Pr Forms (Rev ed), Sales, Form 2:951.

Variation by agreement, 18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 1 — General Provisions, §§ 253:11 et seq.

CJS. 82 C.J.S., Statutes § 309.

Law Reviews. 1978 Mississippi Supreme Court Review: Commercial Law. 50 Miss. L. J. 41, March 1979.

1979 Mississippi Supreme Court Review: Corporate & Commercial Law. 50 Miss. L. J. 741, December 1979.

1979 Mississippi Supreme Court Review: Miscellaneous. 50 Miss. L. J. 833, December 1979.

§ 75-1-104. Construction against implied repeal.

The Uniform Commercial Code being a general act intended as a unified coverage of its subject matter, no part of it shall be deemed to be impliedly repealed by subsequent legislation if such construction can reasonably be avoided.

SOURCES: Present § 75-1-104 is derived from former § 75-1-104 [Codes, 1942, § 41A:1-104; Laws, 1966, ch. 316, § 1-104, eff March 31, 1968; Repealed by Laws, 2010, ch. 506, § 44, eff from and after July 1, 2010] and was enacted by Laws, 2010, ch. 506, § 3, eff from and after July 1, 2010.

Cross References — Construction of statutes generally, see §§ 1-3-1 et seq.

RESEARCH REFERENCES

ALR. Applicability of constitutional requirement that repealing or amendatory statute refer to statute repealed or amended, to repeal or amendment by implication. 5 A.L.R.2d 1270.

Am Jur. 11 Am. Jur. 2d, Bills and Notes § 19.

15A Am. Jur. 2d, Commercial Code § 30.

§ 75-1-105. Severability.

If any provision or clause of the Uniform Commercial Code or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Uniform Commercial Code which can be given effect without the invalid provision or application, and to this end the provisions of the Uniform Commercial Code are severable.

SOURCES: Former § 75-1-105 [Codes, 1942, § 41A:1-105; Laws, 1966, ch. 316, § 1-105; Laws, 1977, ch. 452, § 1; Laws, 1991, ch. 316, § 1; Laws, 1994, ch. 445, § 2; Laws, 1996, ch. 460, § 19; Laws, 1996, ch. 468, § 53; Laws, 2001, ch. 495, § 4, eff from and after Jan. 1, 2002; Repealed by Laws, 2010, ch. 506, § 44, eff from and after July 1, 2010] is now found in comparable provisions enacted at § 75-1-301 by Laws, 2010, ch. 506, § 3, eff from and after July 1, 2010; Present § 75-1-105 is derived from former § 75-1-108 [Codes, 1942, § 41A:1-108; Laws, 1966, ch. 316, § 1-108, eff March 31, 1968; Repealed by Laws, 2010, ch. 506, § 44, eff from and after July 1, 2010] and was enacted by Laws, 2010, ch. 506, § 3, eff from and after July 1, 2010.

RESEARCH REFERENCES

Am Jur. 15A Am. Jur. 2d, Commercial Code § 31.

16 Am. Jur. 2d, Constitutional Law §§ 134 et seq.

73 Am. Jur. 2d, Statutes §§ 243, 269, 270.

§ 75-1-106. Use of singular and plural; gender.

In the Uniform Commercial Code, unless the statutory context otherwise requires:

(1) Words in the singular number include the plural, and those in the plural include the singular; and

(2) Words of any gender also refer to any other gender.

SOURCES: Former § 75-1-106 [Codes, 1942, § 41A:1-106; Laws, 1966, ch. 316, § 1-106, eff March 31, 1968; Repealed by Laws, 2010, ch. 506, § 44, eff from and after July 1, 2010] is now found in comparable provisions enacted at § 75-1-305 by Laws, 2010, ch. 506, § 3, eff from and after July 1, 2010; Present § 75-1-106 is derived from former § 75-1-102(b) [Codes, 1942, § 41A:1-102; Laws, 1966, ch. 316, § 1-102, eff March 31, 1968; Repealed by Laws, 2010, ch. 506, § 44, eff from and after July 1, 2010] and was enacted by Laws, 2010, ch. 506, § 3, eff from and after July 1, 2010.

§ 75-1-107. Section captions.

Section captions are part of the Uniform Commercial Code.

SOURCES: Former § 75-1-107 [Codes, 1942, § 41A:1-107; Laws, 1966, ch. 316, § 1-107, eff March 31, 1968; Repealed by Laws, 2010, ch. 506, § 44, eff from and after July 1, 2010] is now found in comparable provisions enacted at § 75-1-306 by Laws, 2010, ch. 506, § 3, eff from and after July 1, 2010; Present § 75-1-107 is derived from former § 75-1-109 [Codes, 1942, § 41A:1-109; Laws, 1966, ch. 316, § 1-109, eff March 31, 1968; Repealed by Laws, 2010, ch. 506, § 44, eff from and after July 1, 2010] and was enacted by Laws, 2010, ch. 506, § 3, eff from and after July 1, 2010.

RESEARCH REFERENCES

Am Jur. 15A Am. Jur. 2d, Commercial Code § 21.

73 Am. Jur. 2d, Statutes §§ 45, 109.

§ 75-1-108. Relation to Electronic Signatures in Global and National Commerce Act.

This article modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 USC Section 7001 et seq., except that nothing in this article modifies, limits, or supersedes Section 7001(c) of that act or authorizes electronic delivery of any of the notices described in Section 7003(b) of that act.

SOURCES: Former § 75-1-108 [Codes, 1942, § 41A:1-108; Laws, 1966, ch. 316, § 1-108, eff March 31, 1968; Repealed by Laws, 2010, ch. 506, § 44, eff from and after July 1, 2010] is now found in comparable provisions enacted at § 75-1-105 by Laws, 2010, ch. 506, § 3, eff from and after July 1, 2010; Present § 75-1-108 was enacted by Laws, 2010, ch. 506, § 3, eff from and after July 1, 2010.

§ 75-1-109. Repealed.

Repealed by Laws, 2010, ch. 506, § 44, eff from and after July 1, 2010.

§ 75-1-109. [Codes, 1942, § 41A:1-109; Laws, 1966, ch. 316, § 1-109, eff March 31, 1968]

Editor's Note — Former § 75-1-109 provided that section captions were parts of the code. For present similar provisions, see § 75-1-107.

§ 75-1-110. Repealed.

Repealed by Laws, 2010, ch. 506, § 44, eff from and after July 1, 2010.

§ 75-1-110. [Laws, 1978, ch. 401, § 9, eff from and after April 1, 1978.]

Editor's Note — Former § 75-1-110 provided that section captions in the 1977 Cumulative Supplement to Title 75, Chapters through 11 were to be given the same interpretation as that intended by former § 75-1-109.

Part 2.

General Definitions and Principles of Interpretation.

Sec.

75-1-201. General definitions.
75-1-202. Notice; knowledge.
75-1-203. Lease distinguished from security interest.
75-1-204. Value.
75-1-205. Reasonable time; seasonableness.
75-1-206. Presumptions.
75-1-207. Repealed.
75-1-208. Repealed.

§ 75-1-201. General definitions.

(a) Unless the context otherwise requires, words or phrases defined in this section, or in the additional definitions contained in other articles of the Uniform Commercial Code contained in other chapters of this title that apply to particular chapters or parts thereof, have the meanings stated.

(b) Subject to definitions contained in other articles of the Uniform Commercial Code that apply to particular articles or parts thereof:

(1) "Action," in the sense of a judicial proceeding, includes recoupment, counterclaim, setoff, suit in equity, and any other proceeding in which rights are determined.

(2) "Aggrieved party" means a party entitled to pursue a remedy.

(3) "Agreement," as distinguished from "contract," means the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade as provided in Section 75-1-303.

(4) "Bank" means a person engaged in the business of banking and includes a savings bank, savings and loan association, credit union, and trust company.

(5) "Bearer" means a person in possession of a negotiable instrument, document of title, or certificated security that is payable to bearer or indorsed in blank.

(6) "Bill of lading" means a document evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods.

(7) "Branch" includes a separately incorporated foreign branch of a bank.

(8) "Burden of establishing a fact" means the burden of persuading the trier of fact that the existence of the fact is more probable than its nonexistence.

(9) "Buyer in ordinary course of business" means a person that buys goods in good faith, without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind. A person

buys goods in the ordinary course if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller's own usual or customary practices. A person that sells oil, gas, or other minerals at the wellhead or minehead is a person in the business of selling goods of that kind. A buyer in ordinary course of business may buy for cash, by exchange of other property, or on secured or unsecured credit, and may acquire goods or documents of title under a preexisting contract for sale. Only a buyer that takes possession of the goods or has a right to recover the goods from the seller under Article 2 may be a buyer in ordinary course of business. 'Buyer in ordinary course of business' does not include a person that acquires goods in a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

(10) "Conspicuous," with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. Whether a term is "conspicuous" or not is a decision for the court. Conspicuous terms include the following:

(A) A heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and

(B) Language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.

(11) "Consumer" means an individual who enters into a transaction primarily for personal, family, or household purposes.

(12) "Contract," as distinguished from "agreement," means the total legal obligation that results from the parties' agreement as determined by the Uniform Commercial Code as supplemented by any other applicable laws.

(13) "Creditor" includes a general creditor, a secured creditor, a lien creditor, and any representative of creditors, including an assignee for the benefit of creditors, a trustee in bankruptcy, a receiver in equity, and an executor or administrator of an insolvent debtor's or assignor's estate.

(14) "Defendant" includes a person in the position of defendant in a counterclaim, cross-claim, or third-party claim.

(15) "Delivery," with respect to an instrument, document of title, or chattel paper, means voluntary transfer of possession.

(16) "Document of title" includes bill of lading, dock warrant, dock receipt, warehouse receipt or order for the delivery of goods, and also any other document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold, and dispose of the document and the goods it covers. To be a document of title, a document must purport to be issued by or addressed to a bailee and purport to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass.

(17) "Fault" means a default, breach, or wrongful act or omission.

(18) "Fungible goods" means:

(A) Goods of which any unit, by nature or usage of trade, is the equivalent of any other like unit; or

(B) Goods that by agreement are treated as equivalent.

(19) "Genuine" means free of forgery or counterfeiting.

(20) "Good faith," except as otherwise provided in Article 5, means honesty in fact and the observance of reasonable commercial standards of fair dealing.

(21) "Holder" means:

(A) The person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession; or

(B) The person in possession of a document of title if the goods are deliverable either to bearer or to the order of the person in possession.

(22) "Insolvency proceeding" includes an assignment for the benefit of creditors or other proceeding intended to liquidate or rehabilitate the estate of the person involved.

(23) "Insolvent" means:

(A) Having generally ceased to pay debts in the ordinary course of business other than as a result of bona fide dispute;

(B) Being unable to pay debts as they become due; or

(C) Being insolvent within the meaning of federal bankruptcy law.

(24) "Money" means a medium of exchange currently authorized or adopted by a domestic or foreign government. The term includes a monetary unit of account established by an intergovernmental organization or by agreement between two (2) or more countries.

(25) "Organization" means a person other than an individual.

(26) "Party," as distinguished from "third party," means a person that has engaged in a transaction or made an agreement subject to the Uniform Commercial Code.

(27) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity.

(28) "Present value" means the amount as of a date certain of one or more sums payable in the future, discounted to the date certain by use of either an interest rate specified by the parties if that rate is not manifestly unreasonable at the time the transaction is entered into or, if an interest rate is not so specified, a commercially reasonable rate that takes into account the facts and circumstances at the time the transaction is entered into.

(29) "Purchase" means taking by sale, lease, discount, negotiation, mortgage, pledge, lien, security interest, issue or reissue, gift, or any other voluntary transaction creating an interest in property.

(30) "Purchaser" means a person that takes by purchase.

(31) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(32) "Remedy" means any remedial right to which an aggrieved party is entitled with or without resort to a tribunal.

(33) "Representative" means a person empowered to act for another, including an agent, an officer of a corporation or association, and a trustee, executor, or administrator of an estate.

(34) "Right" includes remedy.

(35) "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. "Security interest" includes any interest of a consignor and a buyer of accounts, chattel paper, a payment intangible, or a promissory note in a transaction that is subject to Article 9. "Security interest" does not include the special property interest of a buyer of goods on identification of those goods to a contract for sale under Section 75-2-401, but a buyer may also acquire a "security interest" by complying with Article 9. Except as otherwise provided in Section 75-2-505, the right of a seller or lessor of goods under Article 2 or 2A to retain or acquire possession of the goods is not a "security interest," but a seller or lessor may also acquire a "security interest" by complying with Article 9. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer under Section 75-2-401 is limited in effect to a reservation of a "security interest." Whether a transaction in the form of a lease creates a "security interest" is determined pursuant to Section 75-1-203.

(36) "Send" in connection with a writing, record, or notice means:

(A) To deposit in the mail or deliver for transmission by any other usual means of communication with postage or cost of transmission provided for and properly addressed and, in the case of an instrument, to an address specified thereon or otherwise agreed, or if there be none to any address reasonable under the circumstances; or

(B) In any other way to cause to be received any record or notice within the time it would have arrived if properly sent.

(37) "Signed" includes using any symbol executed or adopted with present intention to adopt or accept a writing.

(38) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(39) "Surety" includes a guarantor or other secondary obligor.

(40) "Term" means a portion of an agreement that relates to a particular matter.

(41) "Unauthorized signature" means a signature made without actual, implied, or apparent authority. The term includes a forgery.

(42) "Warehouse receipt" means a receipt issued by a person engaged in the business of storing goods for hire.

(43) "Writing"" includes printing, typewriting, or any other intentional reduction to tangible form. "Written" has a corresponding meaning.

SOURCES: Former § 75-1-201 [Codes, 1942, § 41A:1-201; Laws, 1966, ch. 316, § 1-201; Laws, 1977, ch. 452, § 2; Laws, 1990, ch. 384, § 45; Laws, 1992, ch. 420, § 69; Laws, 1994, ch. 445, § 3; Laws, 2001, ch. 495, § 5; Laws, 2006, ch. 527, § 41; Laws, 2007, ch. 355, § 34; Laws, 2007, ch. 381, § 34, eff from and after passage (approved Mar. 15, 2007); Repealed by Laws, 2010, ch. 506, § 44, eff from and after July 1, 2010] is now found in comparable provisions at §§ 75-1-201, 75-1-202, 75-1-203 75-1-204 and 75-1-206 enacted by Laws, 2010, ch. 506, § 3, eff from and after July 1, 2010; Former § 75-1-201(21) and (41) were deleted by Laws, 2010, ch. 506, §§ 1and 44, eff from and after July 1, 2010; Present § 75-1-201 is derived from former § 75-1-201(1)-(20), (22)-(24), (28)-(30), (32)-(36), (38)-(40), (42)-(43), and (45-(46) [Codes, 1942, § 41A:1-201; Laws, 1966, ch. 316, § 1-201; Laws, 1977, ch. 452, § 2; Laws, 1990, ch. 384, § 45; Laws, 1992, ch. 420, § 69; Laws, 1994, ch. 445, § 3; Laws, 2001, ch. 495, § 5; Laws, 2006, ch. 527, § 41; Laws, 2007, ch. 355, § 34; Laws, 2007, ch. 381, § 34, eff from and after passage (approved Mar. 15, 2007); Repealed by Laws, 2010, ch. 506, § 44, eff from and after July 1, 2010] and was enacted by Laws, 2010, ch. 506, § 3, eff from and after July 1, 2010.

§ 75-1-202. Notice; knowledge.

(a) Subject to subsection (f), a person has "notice" of a fact if the person:

(1) Has actual knowledge of it;

(2) Has received a notice or notification of it; or

(3) From all the facts and circumstances known to the person at the time in question, has reason to know that it exists.

(b) "Knowledge" means actual knowledge. "Knows" has a corresponding meaning.

(c) "Discover," "learn," or words of similar import refer to knowledge rather than to reason to know.

(d) A person "notifies" or "gives" a notice or notification to another person by taking such steps as may be reasonably required to inform the other person in ordinary course, whether or not the other person actually comes to know of it.

(e) Subject to subsection (f), a person "receives" a notice or notification when:

(1) It comes to that person's attention; or

(2) It is duly delivered in a form reasonable under the circumstances at the place of business through which the contract was made or at another location held out by that person as the place for receipt of such communications.

(f) Notice, knowledge, or a notice or notification received by an organization is effective for a particular transaction from the time it is brought to the attention of the individual conducting that transaction and, in any event, from the time it would have been brought to the individual's attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines. Due diligence does not require an individual

acting for the organization to communicate information unless the communication is part of the individual's regular duties or the individual has reason to know of the transaction and that the transaction would be materially affected by the information.

SOURCES: Former § 75-1-202 [Codes, 1942, § 41A:1-202; Laws, 1966, ch. 316, § 1-202, eff March 31, 1968; Repealed by Laws, 2010, ch. 506, § 44, eff from and after July 1, 2010] is now found in comparable provisions at § 75-1-307 enacted by Laws, 2010, ch. 506, § 3, eff from and after July 1, 2010; Present § 75-1-202 is derived from former § 75-1-201(25)-(27) [Codes, 1942, § 41A:1-201; Laws, 1966, ch. 316, § 1-201; Laws, 1977, ch. 452, § 2; Laws, 1990, ch. 384, § 45; Laws, 1992, ch. 420, § 69; Laws, 1994, ch. 445, § 3; Laws, 2001, ch. 495, § 5; Laws, 2006, ch. 527, § 41; Laws, 2007, ch. 355, § 34; Laws, 2007, ch. 381, § 34, eff from and after passage (approved Mar. 15, 2007); Repealed by Laws, 2010, ch. 506, § 44, eff from and after July 1, 2010] and was enacted by Laws, 2010, ch. 506, § 3, eff from and after July 1, 2010.

JUDICIAL DECISIONS

I. UNDER CURRENT LAW.

1.-5. [Reserved for future use.]

II. UNDER FORMER § 75-1-201.

6. Notice.
7. Notifying or giving notice.
8. Notice received by organization.

I. UNDER CURRENT LAW.

1.-5. [Reserved for future use.]

II. UNDER FORMER § 75-1-201.

6. Notice.

In action for alleged breach by defendant airport board of one-year written agreement under which plaintiff was to serve as "fixed-base" operator of airport in return for use of airport terminal and other facilities, where (1) prior to end of agreement's one-year term, plaintiff attended board meeting at which board approved motion not to renew parties' agreement; and (2) during plaintiff's subsequent out-of-state absence, board sent (a) certified letter containing notice of agreement's termination to plaintiff's business address, and (b) hand-delivered letter containing similar notice that was not accepted by employee at plaintiff's business office, court held, on granting board's motion for summary judgment, (1) that agreement in suit could be described as either "lease of real property" or "contract for services"; (2) that although neither type of contract was explicitly covered by Uniform Commercial Code, code nevertheless constituted persuasive authority with respect to agreements like that in suit; (3) that as a result, provisions of UCC § 75-1-201(26) and (27), which deal with giving of notice, and provisions of UCC § 75-1-201(38), which define term "send," would be applied by analogy; (4) that under such provisions, fact that plaintiff was given copy of board meeting minutes that authorized termination of his contract was sufficient to terminate such agreement, even if court should adopt "actual-delivery-to-person" test urged by plaintiff; (5) that (a) mailing of registered letter to plaintiff's business address was proper "sending" under UCC § 75-1-201(38), (b) act of mailing was "giving of notice" under UCC § 75-1-201(26), and (c) deposit of notice for delivery was proper "receipt" of notification under UCC § 75-1-201(26)(a); (6) that hand delivery of second letter containing notice of plaintiff's termination, which was left on desk of plaintiff's employee over her protest, constituted proper "giving" and "receipt" of notice under UCC § 75-1-201(26) and also proper "sending" under UCC § 75-1-201(38); and (7) that because plaintiff's termination was authorized by board and notice of termination was properly given, board was not liable for breach of contract. Logan v. Corinth-Alcorn County Joint Airport Bd., 665 F. Supp. 506 (N.D. Miss. 1987).

Account debtor did not receive sufficient notice of assignment of account and therefore was authorized to continue making payments to assignor, under § 75-9-318(3), where account debtor, who was farmer, was shown letter describing assignment while out in rice field without his reading glasses, and he signed it with understanding that it was routine account verification, where account debtor was not given copy of letter, where letter neither explicitly stated that account had been assigned nor identified which of account debtor's corporate accounts with assignor was involved, and where, over course of one year or more, account debtor's corporations paid over $50,000 to assignor by checks made payable solely to assignor, and assignee never complained during this period about way payments were made. Warrington v. Dawson, 798 F.2d 1533 (5th Cir. 1986).

Under UCC § 9-504(3), requiring that notice of intended sale of collateral must be "sent" to debtor, and § 1-201(38), defining word "send," notification of the sale must be in writing. Such written notice will be sufficient under UCC § 9-504(3) if it is either personally delivered to the debtor or sent by mail to the debtor's address. In the latter case, whether or not the debtor receives it will not defeat its sufficiency. McKee v. Mississippi Bank & Trust Co., 366 So. 2d 234 (Miss. 1979).

Under UCC §§ 8-304 and 1-201(25), either actual or constructive notice will prevent one from obtaining the status of a bona fide purchaser. Oscar Gruss & Son v. First State Bank, 582 F.2d 424 (7th Cir. Ill. 1978).

Absent actual knowledge or reason to know (see UCC § 1-201(25)), a depositary bank has no affirmative duty to inquire whether a defense exists against a check deposited with it. Frantz v. First Nat'l Bank, 584 P.2d 1125 (Alaska 1978).

UCC § 9-401(2) requires knowledge of contents of the improperly filed financing statement-not knowledge of contents of creditor's security agreement with debtor. Furthermore, under UCC § 1-201(25)(a), such knowledge must be actual knowledge. In re County Green Ltd. Partnership, 438 F. Supp. 693 (W.D. Va. 1977).

In action by cashing bank to recover on check on which payment was subsequently stopped, where check was made payable to named payee as payment for cattle-feeding contract between payee and drawer, another bank holding perfected security interests in all of payee's property called in secured loan to payee and directed payee to turn in all proceeds on payee's accounts receivable and not to pay any of payee's general creditors, payee cashed check in suit at still another bank and paid off certain general creditors, drawer of check stopped payment thereon at request of secured bank, and handwritten part of check stated that it was drawn for $13,430 but check imprinter inadvertently entered "$3,430" on check, cashing bank was holder in due course and entitled to recover under UCC § 3-302(1)(c) because (1) it had no notice under UCC § 1-201(25) of secured bank's claim to check's proceeds from mere publication in biweekly reporting service 17 months previously of secured bank's filing of security agreements on payee's property, even though cashing bank did subscribe to such reporting service; (2) check was negotiable on its face, since it was indorsed by payee and payee's indorsement was not restrictive; (3) statement by payee's wife to officer of cashing bank that check was being cashed to prevent secured bank from "grabbing it" occurred after check was cashed and thus was irrelevant under UCC § 3-304(6) to issue of notice; and (4) cashing bank took check in good faith under UCC § 3-302(1)(b), despite $10,000 error on face of check, since cashing bank had contacted drawee bank to ascertain correct amount of check and to discover whether sufficient funds were on deposit to cover it. McCook County Nat'l Bank v. Compton, 558 F.2d 871 (8th Cir. S.D. 1977), cert. denied, 434 U.S. 905, 98 S. Ct. 302, 54 L. Ed. 2d 191 (1977).

Letter by stockholder's attorney several months after discovery that stock was missing from safe deposit box requesting that stockholder be advised in writing whether issuer showed any change in ownership status of stock did not constitute implied notice as defined under UCC § 1-201(25) that stock had been lost, apparently destroyed or wrongfully taken; thus, stockholder was precluded from taking any action against issuer under UCC

§ 8-405 when issue subsequently registered transfer of stock before receiving any such notice that stock had been lost, apparently destroyed or wrongfully taken. Exxon Corp. v. Raetzer, 533 S.W.2d 842 (Tex. Civ. App. 1976), writ ref'd n.r.e., (June 9, 1976).

Subsequent creditor had actual knowledge under UCC §§ 9-401(2) and 1-201(25) of contents of improperly filed financing statement, and thus financing was effective against subsequent creditor, where subsequent creditor was aware at time that debtor came to it for loan that, except for about $13,000, all of debtor's $160,000 net worth was pledged for two prior bank loans and that pledge covered debtor's equipment. Enark Indus., Inc. v. Bush, 86 Misc. 2d 985 (1976).

Allegations that company which was transferred in exchange for note had never made profit was not sufficient to establish that transfer of note was not for value within meaning of UCC § 3-302, since no facts were alleged relating to worth of company's assets, and allegations that holder of note required payment of substantial portion of note by transferor if maker defaulted, and further required that transferor's terms of transfer be concealed from maker, were insufficient to show that holder had "notice of fraud" within meaning of UCC § 1-201(25). Ritz v. Karstenson, 39 Ill. App. 3d 877, 350 N.E.2d 870 (2d Dist. 1976).

Notwithstanding that agents of owner of counterfeit United States treasury bill inquired at bank as to genuineness of bill, such inquiry did not constitute notice under UCC § 1-201 (25, 26, 27) that bill was not genuine and bank, which took bill as negotiable instrument in bearer form under UCC § 8-105 as bona fide purchaser, was entitled under UCC § 8-306 to rely on owner's warranties as principal that bill was genuine and was not materially altered, but recovery by bank under unjust enrichment was not permitted, since, under UCC §§ 1-102 and 1-103, specific warranties of UCC displaced remedy of unjust enrichment in regard to negotiation of securities in this case. Brannon v. First Nat'l Bank, 137 Ga. App. 275, 223 S.E.2d 473 (1976).

In action by bank against makers of several notes pledged by third party as collateral for loan, trial court properly found that bank had taken notes in good faith and without notice of makers' alleged defenses, pursuant to UCC § 3-302(1) and definitions contained in UCC § 1-201, subsecs. (19), (25) and (27), where officers and employee of bank who handled the transaction testified that they had no knowledge or information concerning any defenses, and described in detail the investigation which they made and information which they gathered to satisfy themselves that notes were valid and that parties with whom they dealt were reliable; where trial court's findings described in some detail the investigations and inquiries made by bank; where trial court found those investigations were reasonable under the circumstances, and that the bank lacked knowledge to know or believe that alleged defenses existed; and where facts found by trial court established that the bank had no connection with transactions for which notes were given. Security Pac. Nat'l Bank v. Chess, 58 Cal. App. 3d 555 (2d Dist. 1976).

Government's perfected tax lien had priority over bank's security interest in funds due taxpayer on construction project where bank failed to perfect its security interest by filing financing statement with secretary of state of taxpayer's home state, as well as with county in which taxpayer had its place of business, as required by UCC § 9-401(1) and where government did not have notice or knowledge of bank's interest in property. United States v. Ed Lusk Constr. Co., 504 F.2d 328 (10th Cir. Okla. 1974).

Where trier of fact conceivable could find that purchaser of securities had constructive knowledge of adverse claim as contemplated by § 1-201(25)(c), by reason of substantial discount at which bonds were being offered, negligence of broker in failing to discover adverse claim to bonds could well be found to be proximate cause of injury to purchaser, which relied on broker's verification in deciding to purchase bonds. Miriani v. Rodman & Renshaw, Inc., 358 F. Supp. 1011 (N.D. Ill. 1973).

"Reason to know" method of notice is objective one, and would not require that taker have actual knowledge of adverse

claim in order to be charged with notice of such claim, but would premise notice upon reasonable commercial standards. Von Gohren v. Pacific Nat'l Bank, 8 Wash. App. 245, 505 P.2d 467 (1973).

Secured creditor with security interest in crops grown during 1971 on two tracts of land, one owned by debtor and other leased by him, took priority over purported attaching creditor, claiming under writ of attachment issued November 11, 1971, with respect to proceeds from sale of crops, notwithstanding security agreement covering both tracts of land was not filed until November 12, 1971: (1) With respect to "leased" tract, where original financing statement covering crops growing or to be grown thereon was filed on July 5, 1966, security agreement covering 1971 crops on both "leased" and "owned" tracts was executed on February 18, 1971, and continuation statement was filed on June 28, 1971, security interest was perfected by filing of continuation statement prior to issuance of attaching creditor's purported attachment and levy thereunder, and took priority over any rights acquired by attaching creditor; (2) with respect to "owned" land, although secured party's security interest was not perfected by filing as of time of levy under attaching creditor's purported attachment, evidence showed that attaching creditor either had actual notice of secured party's interest in crops or could be charged with actual knowledge or duty to secure knowledge of secured party's interest, and, thus, secured party's unperfected security interest took priority over rights of attaching creditor. Gulf Oil Co. United States v. First Nat'l Bank, 503 S.W.2d 300 (Tex. Civ. App. 1973).

UCC § 6-104(3) [Repealed] does not render transfer ineffective unless transferee was shown to have had actual knowledge that list of creditors was incomplete; thus, in action by transferor's customs bond surety against transferee in bulk to recover customs duties assessed against transferor and paid by surety, transferee was not personally liable, although neither surety nor United States were on list of creditors and no notice was given them, where transferee did not have actual knowledge or surety's claim; fact that transferor was partly engaged in importing and transferee had constructive knowledge that some import duty might be due to United States did not render transfer ineffective. Federal Ins. Co. v. Pipeco Steel Corp., 125 N.J. Super. 563, 312 A.2d 510 (App. Div. 1973).

In an action brought to recover for injuries sustained by plaintiff as a result of the unauthorized registration of stock owned by her in the two defendant companies, plaintiff notified each corporate issuer within a reasonable time after she had noticed that her shares had been transferred as a result of forgery as provided by UCC 8-404, where it appeared that plaintiff was a 94-year-old woman who, while a guest in a home, had allowed one of her hosts, whom she trusted, to handle her affairs over a 2 year period, and in light of plaintiff's reliance on the perpetrator of the acts which deprived her of title to her securities and in light of her own age and decrepitude, plaintiff could not be charged with unreasonable action in not checking her accounts from time to time and consequently plaintiff did not have required statutory notice of host's dishonesty until she left his residence. Weller v. AT & T, 290 A.2d 842 (Del. 1972).

Notice that is received has been "sent", even though notice is not written. Crest Inv. Trust, Inc. v. Alatzas, 264 Md. 571, 287 A.2d 261 (1972).

Intendment of UCC notice definition would seem to be an attempt to prevent those dealing in the commercial world from obtaining various rights when, from a reasonable inquiry into the true facts, that person would have discovered a fact which prevented him from obtaining the rights which he was seeking. Winter & Hirsch, Inc. v. Passarelli, 122 Ill. App. 2d 372, 259 N.E.2d 312 (1st Dist. 1970).

Common carrier who transported trailer coach sold in Virginia to Oklahoma was deemed to have notice, under Code § 1-201(25), of Virginia perfected security interest in coach, effective in Oklahoma under Code § 9-103(1). National Trailer Convoy Co. v. Mount Vernon Nat'l Bank & Trust Co., 420 P.2d 889 (Okla. 1966).

The filing of a lease contract, providing for a lien upon personal property of the lessee, in the real estate records, does not

constitute notice of the existence of a lien as to personal property, for actual notice is required under the Uniform Commercial Code. In re King Furn. City, Inc., 240 F. Supp. 453 (E.D. Ark. 1965).

The insertion in a conditional sales contract of the purchaser's name as "Excel Department Stores" instead of its correct corporate title of "Excel Stores, Inc." is a minor error not seriously misleading and does not affect the validity of the instrument. In re Excel Stores, Inc., 341 F.2d 961 (2d Cir. Conn. 1965).

Evidence that seller's representatives had participated in attempts to make helicopter perform in an expected manner established that the seller had notice of breach of implied warranty of fitness. Boeing Airplane Co. v. O'Malley, 329 F.2d 585 (8th Cir. Minn. 1964).

Evidence indicating that a credit equipment company financed the sale of machinery from the manufacturer to the seller, as well as the sale from the seller to the ultimate purchaser, is not sufficient to demand a finding that the credit equipment company had such a relationship with the manufacturer or seller as to impute to it knowledge of any defects or nondeliveries, and the fact that the credit equipment company was merely the financing agency which happened to have financed both transactions was not inconsistent with good faith. Commercial Credit Equip. Corp. v. Reeves, 110 Ga. App. 701, 139 S.E.2d 784 (1964).

7. Notifying or giving notice.

In action for alleged breach by defendant airport board of one-year written agreement under which plaintiff was to serve as "fixed-base" operator of airport in return for use of airport terminal and other facilities, where (1) prior to end of agreement's one-year term, plaintiff attended board meeting at which board approved motion not to renew parties' agreement; and (2) during plaintiff's subsequent out-of-state absence, board sent (a) certified letter containing notice of agreement's termination to plaintiff's business address, and (b) hand-delivered letter containing similar notice that was not accepted by employee at plaintiff's business office, court held, on granting board's motion for summary judgment, (1) that agreement in suit could be described as either "lease of real property" or "contract for services"; (2) that although neither type of contract was explicitly covered by Uniform Commercial Code, code nevertheless constituted persuasive authority with respect to agreements like that in suit; (3) that as a result, provisions of UCC § 75-1-201(26) and (27), which deal with giving of notice, and provisions of UCC § 75-1-201(38), which define term "send," would be applied by analogy; (4) that under such provisions, fact that plaintiff was given copy of board meeting minutes that authorized termination of his contract was sufficient to terminate such agreement, even if court should adopt "actual-delivery-to-person" test urged by plaintiff; (5) that (a) mailing of registered letter to plaintiff's business address was proper "sending" under UCC § 75-1-201(38), (b) act of mailing was "giving of notice" under UCC § 75-1-201(26), and (c) deposit of notice for delivery was proper "receipt" of notification under UCC § 75-1-201(26)(a); (6) that hand delivery of second letter containing notice of plaintiff's termination, which was left on desk of plaintiff's employee over her protest, constituted proper "giving" and "receipt" of notice under UCC § 75-1-201(26) and also proper "sending" under UCC § 75-1-201(38); and (7) that because plaintiff's termination was authorized by board and notice of termination was properly given, board was not liable for breach of contract. Logan v. Corinth-Alcorn County Joint Airport Bd., 665 F. Supp. 506 (N.D. Miss. 1987).

UCC §§ 2-201(2) and 1-201(26) do not prescribe any particular method for proving the receipt of a confirmatory writing. However, to prove such receipt, the sending merchant can rely on the presumption that a correctly addressed letter, which was properly mailed and was not returned undelivered to the sender, was delivered to the addressee. Perdue Farms, Inc. v. Motts, Inc., 459 F. Supp. 7 (N.D. Miss. 1978).

Where (1) certified letters were mailed to debtor and each guarantor advising them that collateral had been repossessed, that they had right of redemption, and that if such right were not exercised

by specified date, collateral would be sold, and (2) where such letters were followed by other letters informing debtor and guarantors that collateral had been advertised for sale, court held that such notice of sale of collateral was commercially reasonable and sufficient under UCC § 9-504(3) and UCC § 1-201(26). Cessna Fin. Corp. v. Meyer, 575 P.2d 1048 (Utah 1978).

Notwithstanding that agents of owner of counterfeit United States treasury bill inquired at bank as to genuineness of bill, such inquiry did not constitute notice under UCC § 1-201 (25, 26, 27) that bill was not genuine and bank, which took bill as negotiable instrument in bearer form under UCC § 8-105 as bona fide purchaser, was entitled under UCC § 8-306 to rely on owner's warranties as principal that bill was genuine and was not materially altered, but recovery by bank under unjust enrichment was not permitted, since, under UCC §§ 1-102 and 1-103, specific warranties of UCC displaced remedy of unjust enrichment in regard to negotiation of securities in this case. Brannon v. First Nat'l Bank, 137 Ga. App. 275, 223 S.E.2d 473 (1976).

Notice of assignment which was sent by registered mail and received by account debtor at its shipping dock was sufficient, although it never reached account debtor's accounting department. Ertel v. Radio Corp. of Am., 261 Ind. 573, 307 N.E.2d 471 (1974), on remand, 171 Ind. App. 51, 354 N.E.2d 783 (1976).

Where debtor assigned accounts receivable to secure payment of note at maturity, and creditor notified account debtor by letter of assignment, account debtor was under duty to pay over to secured party amount due to debtor and was liable to secured party for payments subsequently made to debtor. Moab Nat'l Bank v. Keystone-Wallace Resources, 30 Utah 2d 330, 517 P.2d 1020 (1973).

Notification by certified mail is reasonable, and actual knowledge by the person notified is unnecessary. Hudspeth Motors, Inc. v. Wilkinson, 238 Ark. 410, 382 S.W.2d 191 (1964), but see, Stimson Tractor Co. v. Heflin, 257 Ark. 263, 516 S.W.2d 379 (1974).

8. Notice received by organization.

In action for alleged breach by defendant airport board of one-year written agreement under which plaintiff was to serve as "fixed-base" operator of airport in return for use of airport terminal and other facilities, where (1) prior to end of agreement's one-year term, plaintiff attended board meeting at which board approved motion not to renew parties' agreement; and (2) during plaintiff's subsequent out-of-state absence, board sent (a) certified letter containing notice of agreement's termination to plaintiff's business address, and (b) hand-delivered letter containing similar notice that was not accepted by employee at plaintiff's business office, court held, on granting board's motion for summary judgment, (1) that agreement in suit could be described as either "lease of real property" or "contract for services"; (2) that although neither type of contract was explicitly covered by Uniform Commercial Code, code nevertheless constituted persuasive authority with respect to agreements like that in suit; (3) that as a result, provisions of UCC § 75-1-201(26) and (27), which deal with giving of notice, and provisions of UCC § 75-1-201(38), which define term "send," would be applied by analogy; (4) that under such provisions, fact that plaintiff was given copy of board meeting minutes that authorized termination of his contract was sufficient to terminate such agreement, even if court should adopt "actual-delivery-to-person" test urged by plaintiff; (5) that (a) mailing of registered letter to plaintiff's business address was proper "sending" under UCC § 75-1-201(38), (b) act of mailing was "giving of notice" under UCC § 75-1-201(26), and (c) deposit of notice for delivery was proper "receipt" of notification under UCC § 75-1-201(26)(a); (6) that hand delivery of second letter containing notice of plaintiff's termination, which was left on desk of plaintiff's employee over her protest, constituted proper "giving" and "receipt" of notice under UCC § 75-1-201(26) and also proper "sending" under UCC § 75-1-201(38); and (7) that because plaintiff's termination was authorized by board and notice of termination was properly given, board was not liable for breach of contract. Logan v. Corinth-Alcorn County Joint Airport Bd., 665 F. Supp. 506 (N.D. Miss. 1987).

Lessee under contract with county airport board received sufficient written notice of termination of the contract under standards set by Miss Code § 75-1-201(26), (27), and (38), where lessee was provided with copy of minutes authorizing termination, where registered letter was mailed to lessee, and where second letter was hand delivered to lessee's offices, in spite of fact that receipt of both letters was refused. Logan v. Corinth-Alcorn County Joint Airport Bd., 665 F. Supp. 506 (N.D. Miss. 1987).

In action by corporate depositor against drawee bank charging bank with improper disposition of money on deposit in corporation's account in that bank credited corporate checks which were made payable to bank to private accounts of corporate employee and his associate, under UCC § 1-201 (27) evidence of information possessed by individual employees of bank relating to bank's dealings with employee and his associate, tending to show that person who had knowledge of these facts would have had grounds for suspicion about financial activities of these two men, should be limited to that which jury could reasonably find would have come to attention of employees responsible for handling of these checks if bank had "exercised due diligence." Transamerica Ins. Co. v. United States Nat'l Bank, 276 Or. 945, 558 P.2d 328 (1976).

Notwithstanding that agents of owner of counterfeit United States treasury bill inquired at bank as to genuineness of bill, such inquiry did not constitute notice under UCC § 1-201 (25, 26, 27) that bill was not genuine and bank, which took bill as negotiable instrument in bearer form under UCC § 8-105 as bona fide purchaser, was entitled under UCC § 8-306 to rely on owner's warranties as principal that bill was genuine and was not materially altered, but recovery by bank under unjust enrichment was not permitted, since, under UCC §§ 1-102 and 1-103, specific warranties of UCC displaced remedy of unjust enrichment in regard to negotiation of securities in this case. Brannon v. First Nat'l Bank, 137 Ga. App. 275, 223 S.E.2d 473 (1976).

In action by bank against makers of several notes pledged by third party as collateral for loan, trial court properly found that bank had taken notes in good faith and without notice of makers' alleged defenses, pursuant to UCC § 3-302(1) and definitions contained in UCC § 1-201, subsecs. (19), (25) and (27), where officers and employees of bank who handled the transaction testified that they had no knowledge or information concerning any defenses, and described in detail the investigation which they made and information which they gathered to satisfy themselves that notes were valid and that parties with whom they dealt were reliable; where trial court's findings described in some detail the investigations and inquiries made by bank; where trial court found those investigations were reasonable under the circumstances, and that the bank lacked knowledge to know or believe that alleged defenses existed; and where facts found by trial court established that the bank had no connection with transactions for which notes were given. Security Pac. Nat'l Bank v. Chess, 58 Cal. App. 3d 555 (2d Dist. 1976).

Bank was not bona fide purchaser within meaning of UCC § 8-302 and was liable for conversion of stolen treasury bills, where owner notified bank of loss but bank did not make reasonable efforts to advise its discount and collateral department of existence of lost securities file, and where bank subsequently took bills as collateral for loans. The test of sufficiency of notice is objective one under UCC § 1-201(27) and not whether or not individuals involved were in fact aware of notice. Morgan Guar. Trust Co. v. Third Nat'l Bank, 529 F.2d 1141 (1st Cir. Mass. 1976).

Account debtor did not receive notice of assignments made by its creditor to bank where, inter alia, notice was given to employee of debtor who was not in such position that notice to him could reasonably be construed to be notice to debtor. Bank of Salt Lake v. Corporation of President of Church of Jesus Christ of Latter-Day Saints, 534 P.2d 887 (Utah 1975).

Notice to corporation president of private sale of repossessed equipment could not be imputed to corporate officers who were accommodation indorsers of note where president was also officer of repos-

sessing equipment supplier, and where repossessor, although aware of this probability of conflict of interest, had not taken "such steps as may be reasonably required to inform the other party in the ordinary course". T & W Ice Cream, Inc. v. Carriage Barn, Inc., 107 N.J. Super. 328, 258 A.2d 162 (L. Div. 1969).

§ 75-1-203. Lease distinguished from security interest.

(a) Whether a transaction in the form of a lease creates a lease or security interest is determined by the facts of each case.

(b) A transaction in the form of a lease creates a security interest if the consideration that the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease and is not subject to termination by the lessee, and:

(1) The original term of the lease is equal to or greater than the remaining economic life of the goods;

(2) The lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods;

(3) The lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or for nominal additional consideration upon compliance with the lease agreement; or

(4) The lessee has an option to become the owner of the goods for no additional consideration or for nominal additional consideration upon compliance with the lease agreement.

(c) A transaction in the form of a lease does not create a security interest merely because:

(1) The present value of the consideration the lessee is obligated to pay the lessor for the right to possession and use of the goods is substantially equal to or is greater than the fair market value of the goods at the time the lease is entered into;

(2) The lessee assumes risk of loss of the goods;

(3) The lessee agrees to pay, with respect to the goods, taxes, insurance, filing, recording, or registration fees, or service or maintenance costs;

(4) The lessee has an option to renew the lease or to become the owner of the goods;

(5) The lessee has an option to renew the lease for a fixed rent that is equal to or greater than the reasonably predictable fair market rent for the use of the goods for the term of the renewal at the time the option is to be performed; or

(6) The lessee has an option to become the owner of the goods for a fixed price that is equal to or greater than the reasonably predictable fair market value of the goods at the time the option is to be performed.

(d) Additional consideration is nominal if it is less than the lessee's reasonably predictable cost of performing under the lease agreement if the option is not exercised. Additional consideration is not nominal if:

(1) When the option to renew the lease is granted to the lessee, the rent is stated to be the fair market rent for the use of the goods for the term of the renewal determined at the time the option is to be performed; or

(2) When the option to become the owner of the goods is granted to the lessee, the price is stated to be the fair market value of the goods determined at the time the option is to be performed.

(e) The "remaining economic life of the goods" and "reasonably predictable" fair market rent, fair market value, or cost of performing under the lease agreement must be determined with reference to the facts and circumstances at the time the transaction is entered into.

SOURCES: Former § 75-1-203 [Codes, 1942, 41A:1-203; Laws, 1966, ch. 316, § 1-203, eff March 31, 1968; Repealed by Laws, 2010, ch. 506, § 44, eff from and after July 1, 2010] is now found in comparable provisions at § 75-1-304 enacted by Laws, 2010, ch. 506, § 3, eff from and after July 1, 2010; Present § 75-1-203 is derived from former § 75-1-201(37) [Codes, 1942, § 41A:1-201; Laws, 1966, ch. 316, § 1-201; Laws, 1977, ch. 452, § 2; Laws, 1990, ch. 384, § 45; Laws, 1992, ch. 420, § 69; Laws, 1994, ch. 445, § 3; Laws, 2001, ch. 495, § 5; Laws, 2006, ch. 527, § 41; Laws, 2007, ch. 355, § 34; Laws, 2007, ch. 381, § 34, eff from and after passage (approved Mar. 15, 2007); Repealed by Laws, 2010, ch. 506, § 44, eff from and after July 1, 2010] and was enacted by Laws, 2010, ch. 506, § 3, eff from and after July 1, 2010.

JUDICIAL DECISIONS

I. UNDER CURRENT LAW.

1.-5. [Reserved for future use.]

II. UNDER FORMER § 75-1-201.

I. UNDER CURRENT LAW.

1.-5. [Reserved for future use.]

II. UNDER FORMER § 75-1-201.

Where terms of bareboat charter-lease agreement and guaranty were unequivocal in defining and limiting rights of parties to agreement, contained nothing to indicate that agreement was intended to be anything other than a pure lease, and granted no right or option to lessee to purchase vessel leased, transaction could not be characterized under UCC § 1-201(37) as lease for security. WPL Marine Servs., Inc. v. Woods-Tucker Aircraft & Marine Leasing Corp., 361 So. 2d 1304 (La. 1978), writ denied, 364 So. 2d 121 (La. 1978), writ denied, 364 So. 2d 122 (La. 1978).

A surety's right to earned progress payments under a construction contract that it has bonded is not an "interest in personal property" that is subject to the filing provisions of the Alaska UCC, since the surety in such a case has a right to complete the job and apply any earned funds against its costs. This right of the surety does not secure the payment or performance of an obligation as a "security interest," as that term is defined by Alaska UCC § 1-201(37). Alaska State Bank v. General Ins. Co. of Am., 579 P.2d 1362 (Alaska 1978).

Under UCC § 9-102(1)(a) and (2) and UCC § 1-201(37), contract for lease of automobile was lease intended for security and not "pure lease" where it provided, among other things, (1) that on termination of agreement prior to expiration of fixed term, lessee was to return vehicle to lessor, (2) that lessor was then obligated to accept highest available cash offer at wholesale for vehicle and to notify lessee of any "gain or loss," which was difference between wholesale price accepted for vehicle and its "termination value" as determined by formula contained in lease agreement, (3) that lessee would owe lessor "depreciation value" of vehicle, as offset by amount received from its disposition at wholesale, and would receive from lessor any "gain" over such "depreciation value," (4) that lessee would have to pay all license fees and taxes, and (5) that lessee would also have to pay amounts specifically denominated as "sales tax" and "security deposit." Bill Swad Leasing Co. v. Stikes, 571 F.2d 1361,

23 U.C.C. Rep. Serv. 1335 (5th Cir. Ala. 1978) (applying Alabama and Ohio law; stating that termination formula of lease recognized lessee's equity in leased vehicle, that required security deposit of $1,000 was equivalent of down payment on vehicle, and fact that lease agreement did not contain option to purchase was not controlling).

Where (1) first corporation obtained financing from Texas bank for purchase of five airplanes, which it intended to resell, and Texas bank, in November, 1972, filed separate chattel mortgage for each plane with Federal Aviation Administration pursuant to federal law, (2) second corporation purchased the five planes from the first corporation and borrowed $18,000 from Kentucky bank on unsecured note to finance purchase, (3) second corporation, on default in payment for planes, entered into new agreement with first corporation for purchase of only one plane and return of other four, and also agreed not to file bill of sale with Federal Aviation Administration for plane purchased, (4) second corporation gave Kentucky bank, which held second corporation's unsecured note for $18,000, security agreement which secured repayment of note by encumbering single plane purchased, and bank, in exchange for such security agreement, agreed not to sue on note and filed both security agreement and bill of sale for plane with Federal Aviation Administration, (5) second corporation defaulted in making payments on plane, and first corporation foreclosed on plane and sold it at auction under authority of its November, 1972 security agreement with Texas bank, which security agreement had been assigned to first corporation on its repayment of amount that it owed Texas bank, and (6) second corporation's financer (Kentucky bank) sued first corporation for wrongful interference with its collateral by not respecting bank's lien on repossessed plane, court held (1) that Kentucky bank, under UCC § 1-201(44)(b), gave "value" when it took security interest in plane purchased by second corporation to secure bank's preexisting claim against such corporation, (2) that by virtue of UCC § 9-204(1), Uniform Commercial Code does not require that "consideration" in strict-law sense be given as prerequisite for security interest to attach to collateral, (3) that Kentucky bank's security interest attached at time it gave value and was duly and properly perfected when bank filed instruments with Federal Aviation Administration, (4) that first corporation, under UCC § 1-201(37), had no valid security interest in plane that it repossessed and sold, since first corporation, by discharge of obligation underlying its security interest, had extinguished such security interest, and (5) that first corporation's foreclosure on, and sale of, plane was wrongful and in derogation of rights of plaintiff Kentucky bank, which held valid security interest in plane. Bank of Lexington v. Jack Adams Aircraft Sales, Inc., 570 F.2d 1220 (5th Cir. 1978).

The Uniform Commercial Code has many provisions, especially in Article 9, that apply to "security interests." Therefore, "security interest" is defined in UCC § 1-201(37) for the purpose of identifying the transactions to which those provisions apply. United States Fid. & Guar. Co. v. Thompson & Green Mach. Co., 568 S.W.2d 821 (1978).

When the holder of promissory notes assigned his interest therein as collateral to secure payment of a prior indebtedness, a sum less than the aggregate amount of the notes, and indorsed and delivered them to that creditor, he did not irrevocably divest himself of the ultimate right to all of the proceeds of the notes, but retained ownership of those proceeds not required to satisfy that indebtedness, and, therefore, the negotiation of all of the notes operated only as a partial assignment of the proceeds of the notes; the interest retained by him was capable of being transferred and, when it was transferred by another collateral assignment, the transferee acquired a valid security interest as to his residuary interest in the notes, which security interest was perfected by a subsequent delivery of the notes to it. Lipkowitz & Plaut v. Affrunti, 95 Misc. 2d 849 (1978).

Under UCC § 1-201(37), lease under which lessee had option of purchasing leased equipment for one dollar at end of lease term could be viewed as conditional sale of the equipment. Equilease Corp. v.

D'Annolfo, 6 Mass. App. Ct. 919, 379 N.E.2d 1130 (1978).

Lease of equipment purchased for installation in lessee's motel was not true lease or bailment, but was lease intended for security purposes within meaning of UCC § 1-201(37), where (1) lessor was in finance business instead of equipment-leasing business, (2) lessee had option to purchase equipment at end of lease for its fair market value, which was estimated to be less than ten per cent of price lessor paid for equipment, (3) lease provided that lessee was liable for all taxes, fees, charges, and insurance premiums, (4) lessor was to be held harmless from all liability arising from ordering, delivery, or installation of equipment, (5) on lessee's default, all remaining "rentals" could be accelerated at lessor's option, and equipment could be repossessed at lessee's expense, and (6) equipment was leased subject to exclusion of implied warranties of merchantability and fitness for intended purpose. Citizens & S. Equip. Leasing, Inc. v. Atlanta Fed. Sav. & Loan Ass'n, 144 Ga. App. 800, 243 S.E.2d 243 (1978).

Where (1) lessor of computer, after purchasing it from manufacturer, leased it to lessee for 72 months at fixed rental per month, (2) lease provided that lessee could renew lease for one year for sum that equalled amount of one monthly rent payment and that at end of such renewal, lessee would become owner of computer, (3) lessee's obligation to pay rent was absolute and unconditional, and lease was not cancellable, (4) lessor disclaimed all warranties, express or implied, including implied warranties of merchantability and fitness for particular use, (5) computer did not function properly, and (6) lessee defended refusal to pay further rent on ground of failure of consideration, court held (1) that under UCC § 1-201(37), lease as a matter of law was actually intended as security agreement, especially since lessee could become owner of computer by paying amount that was equivalent to only one monthly rental, (2) that since lessor was to be viewed as conditional seller of computer, UCC § 9-206(2) applied with respect to effectiveness of lessor's disclaimer of warranties, (3) that warranty disclaimer in lease clearly satisfied requirements of UCC § 2-316(2) for exclusion or modification of warranties, (4) that lessee's remedy was solely against manufacturer of computer, instead of lessor, and (5) that under UCC § 9-501(1), lessor, with respect to lessee's failure to pay rent, had rights and remedies provided in security agreement between the parties, which agreement provided that on lessee's default and demand by lessor, lessee would pay amount equal to all unpaid rentals under the lease, plus interest at specified rate. Citicorp Leasing, Inc. v. Allied Institutional Distribs., Inc., 454 F. Supp. 511 (W.D. Okla. 1977).

Under UCC § 1-201(37), whether a lease is intended as security must be determined by the facts of each case. However, if the language of the agreement is clear and unambiguous, the intention of the parties is no longer a fact question on which testimony can be received, and the parol evidence rule requires that their intentions be found from the contract itself. In such a case, the matter becomes a question of law for the trial court. Citicorp Leasing, Inc. v. Allied Institutional Distribs., Inc., 454 F. Supp. 511 (W.D. Okla. 1977).

The factors involved in determining whether a lease is intended as a security agreement or a pure lease (see UCC § 1-201(37)) are as follows: (1) the facts in each case are controlling as to the intention of the parties to create a security interest; (2) reservation of title in a lease, or in an option to purchase that is appurtenant to the lease or included therein, does not by itself make the lease a security agreement; (3) a lease which permits the lessee to become the owner of the property at the end of the term for a nominal consideration or for no additional consideration is deemed as a matter of law to be intended as a security agreement; (4) the percentage that the option-purchase price bears to the list price of the leased property, especially if it is less than 25 percent, is to be considered as showing the intent of the parties to make a lease as security; (5) where the terms of the lease and option to purchase are such that the only sensible course for the lessee to follow at the end of the term is to exercise the option and become the owner of the goods, the

lease is one intended to create a security interest; and (6) the character of a transaction as a true lease is indicated by (a) a provision specifying an option-purchase price that is approximately the market value of the leased property at the time of the exercise of the option, (b) rental charges indicating an intent to compensate the lessor for loss of value of the leased property over the term of the lease due to aging, wear, and obsolescence, (c) rentals that are not excessive and an option-purchase price that is not too low, and (d) facts showing that the lessee is acquiring no equity in the leased article during the term of the lease. Citicorp Leasing, Inc. v. Allied Institutional Distribs., Inc., 454 F. Supp. 511 (W.D. Okla. 1977).

Provision in security agreement executed on purchase of new automobile which provided that until indebtedness was fully paid, "seller has and shall retain title to and a security interest in the property" did not violate federal Truth-in-Lending Act and Regulation Z, since (1) Uniform Commercial Code, in UCC § 1-201(37), now provides universal definition of term "security interest," (2) Uniform Commercial Code was designed to replace confusingly numerous security devices that prevailed under pre-Code practice, and (3) it would therefore be anomalous and counterproductive of UCC objectives to interpret Regulation Z, which requires disclosure of "type of any security interest held," as requiring lender to specify particular security device employed. In such case, it was sufficient that security agreement in issue contained reference to a "security interest" in property described in the agreement that was enforceable under the Uniform Commercial Code, and statement in the agreement that seller retained "title" to such property, although unnecessary and irrelevant in light of UCC § 9-102(1) and (2) and § 9-302(3), did not make lender's disclosure statement confusing or misleading. Drew v. Flagship First Nat'l Bank, 448 F. Supp. 434 (M.D. Fla. 1977).

Under UCC § 1-201(37), leasing agreements which provided for rental of computer equipment for specified monthly rental for first five years and for higher monthly rental for remainder of lease period, and which also gave lessee option to purchase such equipment for 2.7 per cent of equipment's total rental value, or 4 per cent of price lessor paid for equipment, were leases intended as security for payment by lessee of purchase price of equipment and thus were governed by UCC Article 9. National Equip. Rental, Ltd. v. Priority Elecs. Corp., 435 F. Supp. 236, 22 U.C.C. Rep. Serv. 280 (E.D.N.Y. 1977).

Although UCC § 1-201(37) states that effect of lease is to be determined by facts of each case, the statute also provides that if there is a purchase option for a nominal consideration, the lease is then one that is intended for security. National Equip. Rental, Ltd. v. Priority Elecs. Corp., 435 F. Supp. 236 (E.D.N.Y. 1977).

Whether a transaction is characterized as a "sale" or a "lease" is not conclusive. Instead, it is the intention of the parties that is controlling, and this intention is to be determined by the facts of each case (see UCC § 1-201(37)). Indicative factors may include (1) whether the lessee is given an option to purchase the leased equipment and, if so, whether the option price is nominal (see UCC § 1-201(37)); (2) whether the lessee can acquire any equity in the equipment; (3) whether the lessee is required to bear the entire risk of loss; (4) whether the lessee is required to pay all charges and taxes imposed on ownership; (5) whether there is a provision for acceleration of rental payments; (6) whether the equipment was purchased specifically for lease to the lessee; and (7) whether the implied warranties of merchantability and fitness for a particular purpose are specifically excluded by the lease agreement. Lease Fin., Inc. v. Burger, 40 Colo. App. 107, 575 P.2d 857, 23 U.C.C. Rep. Serv. 1309 (1977) (holding that fact that "master lease" agreement did not grant lessee option to purchase leased equipment, plus other evidence which showed that both lessor and lessee apparently intended transaction to be lease, supported trial court's determination that agreement was lease and not conditional sales contract).

Lease arrangement, under which owner sold equipment to a company whose only business was financing and not equip-

ment maintenance, and company advanced funds to former owner's creditors, leased equipment to former owner with an option to buy, recorded an Article 9 UCC financing statement, and assigned the agreement to a bank, constituted a secured loan arrangement. National Equip. Rental, Ltd. v. Hendrix, 565 F.2d 255 (2d Cir. N.Y. 1977).

Where (1) buyer, under oral agreement to pay cash, bought used trencher and trailer from seller and accepted machinery on its delivery by seller, (2) seller listed buyer on seller's books as debtor but did not have buyer execute any document, (3) bank made loan to buyer, and buyer executed security agreement and financing statement giving bank security interest in machinery bought from seller (4) bank perfected its security interest in machinery, (5) on buyer's default, seller reclaimed machinery with buyer's consent, but without bank's consent or knowledge, and (6) bank sued seller for possession of machinery or value thereof, trial court properly held that seller's interest in machinery was subordinate to interest of bank, since under UCC § 2-401(1) and § 1-201(37), seller's reservation of title to machinery was limited in effect to reservation of security interest, and bank had perfected its security interest by filing financing statement, but seller had not filed such a statement. Peerless Equip. Co. v. Azle State Bank, 559 S.W.2d 114 (Tex. Civ. App. 1977).

Lease of automobile was not contract of sale with retained security interest under UCC § 1-201(37)(b), where agreement designated capital cost of vehicle as $13,000, total rental due lessor was $14,256 over period of lease, and option-to-purchase price was $2,600, since option price was additional and sufficient consideration, and not nominal sum. Rebhun v. Executive Equip. Corp., 90 Misc. 2d 576 (1977).

Under UCC § 9-102(1) and UCC § 1-201(37), Article 9 applies not only to any transaction that is intended to create security interest in chattel paper, accounts, or contract rights, but also to any sale of accounts, contract rights, or chattel paper. Ralston Purina Co. v. Detwiler, 173 Ind. App. 513, 364 N.E.2d 180 (1977).

Under UCC § 1-201(37) and UCC § 9-102(2), purported five-year "lease" of printing equipment was actually instalment-sale contract which provided for an excessive rate of interest that rendered the contract void for usury where (1) lessor was finance company that was actually engaged in financing the sale of such printing equipment; (2) all risk of loss or damage to leased property was placed on lessee; (3) contract provided same remedies on lessee's default in payment of rent, even at end of first month, that would be available to a conditional seller or a mortgagee on a similar delinquency; (4) contract expressly provided that lessee, at lessor's request, would join lessor in executing financial statements pursuant to the Uniform Commercial Code; and (5) lessee, after all payments had been made under the purported "lease," could acquire title to the leased property by paying lessor nominal sum therefor. Bell v. Itek Leasing Corp., 262 Ark. 22, 555 S.W.2d 1 (1977).

Although instrument under which corporation (engaged in business of financing lease agreements) leased new office machine, purchased by corporation from machine's manufacturer, to real estate company was denominated a "lease," transaction between parties was actually secured transaction under UCC § 1-201(37)(b), where such "lease" provided that lessee could purchase machine for nominal consideration; transaction was therefore subject to secured transactions provisions of UCC Article 9, and contract would be viewed as conditional sales contract under which the "lessee" was actually a "buyer." Lectro Mgt., Inc. v. Freeman, Everett & Co., 135 Vt. 213, 373 A.2d 544 (1977).

As a result of the definition of "security interest" in UCC § 1-201(37) and the provisions of UCC § 9-102(2), only those consignments intended as security are directly subject to the provisions of UCC Art 9 concerning secured transactions, but all consignments, whether intended as security or not, are subject to the requirements of UCC § 2-326, which is in UCC Art 2 dealing with sales. GECC v. Town & Country Mobile Homes, Inc., 117 Ariz. 562, 574 P.2d 50 (Ct. App. 1977).

Equipment lease agreement that permitted purchase at end of lease for approximately 10 per cent of list price, coupled with absence of option to terminate, created a security interest in lessor under UCC § 1-201(37) and since lessor's security interest was not perfected, the lessor's interest was junior to subsequently perfected liens against equipment. Percival Constr. Co. v. Miller & Miller Auctioneers, Inc., 532 F.2d 166 (10th Cir. Okla. 1976).

Purported lease of computer equipment was intended as financing device and, thus, under UCC § 1-201(37), purported lessor's interest in computers was security interest falling squarely within Article 9 of UCC, where (1) purported lease not only included option to purchase and agreement that lessee could become owner of property at end of lease term for nominal consideration, but also provided that if lessee defaulted in its monthly payments, lessee became immediately liable, not only for total amount of unpaid rent, but also for any deficiency resulting from sale of equipment not equaling estimated market value of equipment as defined by contract; (2) purported lessor acquired security interest not only in leased computers, but also in other computer equipment in possession of lessee; and (3) moreover, concurrent with lease, purported lessor filed financing statements with secretary of state and county recorder of deeds. Computer Sciences Corp. v. Sci-Tek, Inc., 367 A.2d 658 (Del. Super. 1976).

Notwithstanding language of "lease-purchase agreement," it was clear that credit corporation and purported lessee of dump truck contemplated entering into secured transaction under UCC § 9-101 et seq. where financing statement listed credit corporation as secured party and purported lessee as debtor, and covered dump truck as secured item, where motor vehicle certificate of ownership listed purported lessee as owner and credit corporation as secured party and where purported lessee had option under "lease" to purchase truck for one dollar after making all installment payments. GECC v. Castiglione, 142 N.J. Super. 90, 360 A.2d 418 (1976).

Filing of financing statement is not itself a factor in determining whether lease is intended as security. Rollins Communications, Inc. v. Georgia Inst. of Real Estate, Inc., 140 Ga. App. 448, 231 S.E.2d 397 (1976).

Where purported lease agreement provided that lessors would turn over possession of 55 head of dairy cattle to lessees, that lessees would pay lessors $450 per month for five year term, and that at expiration of term, lessees had option to purchase cattle for $10, where market value of cattle was approximately $450 per head at time parties entered into their agreement, and where parties anticipated that market value of animals at end of five year period would be no less than $200 per head, lessees had option at expiration of "lease" term to purchase cattle for nominal consideration and, thus, under UCC § 1-201(37), agreement was one intended for security and lessors' interest in cattle was security interest. Whitworth v. Krueger, 98 Idaho 65, 558 P.2d 1026, 99 A.L.R.3d 1046 (1976).

Bankruptcy judge was justified in holding that purported lease transaction was conditional sale, that contract executed by bankrupt and typewriter dealer whereby bankrupt agreed to pay $15.00 per month for 22 month term and was given option to purchase typewriter for $6.55 at end of term was security interest required by UCC to be filed, and that, in view of absence of filing, title to machine vested in bankruptcy trustee, where it was clear that transaction was understood to be sale by both bankrupt and by typewriter dealer's employees who dealt with him; among other things, bankrupt came to dealer's place of business to buy typewriter, dealer intended to sell him typewriter, and so-called "lease-ownership" contract was used because bankrupt preferred it. In re Shell, 390 F. Supp. 273 (E.D. Ark. 1975).

Lessor's subsequent offer to sell leased beauty shop equipment to lessee did not convert lease into unperfected security interest under UCC § 1-201(37). Leaseamerica Corp. v. Kleppe, 405 F. Supp. 39 (N.D. Iowa 1975).

Purported lease of trade fixtures was not true lease, but was in fact installment loan, where, inter alia, although lease did not contain express option to purchase, renewal option was in fact purchase op-

tion, and where option price was 10 per cent of original price, or approximately 7.2 per cent of total rentals under lease, and thus appeared to be minimal. McGalliard v. Liberty Leasing Co. of Alaska, Inc., 534 P.2d 528, 94 A.L.R.3d 621 (Alaska 1975), but see, Western Enters. v. Arctic Office Machs., 667 P.2d 1232 (Alaska 1983).

Automobile "lease agreement" was, in fact, secured transaction within meaning of Article 9 of Uniform Commercial Code where agreement was of indefinite duration and, at its inception, passed all risks and indicia of ownership of vehicle to purported lessee, in that lessee not only insured against any loss to leasing company of its capitalized cost, but after 26 months was entitled to any surplus funds if and when car was sold, and where at end of 56 months, car would, at option of leasee, pass to her at no cost, since monthly installment payments would have equaled capitalized cost of vehicle. Right of debtor to receive notice of intended disposition of collateral after default may not be limited under UCC § 9-501(1) and (3)(b), and inasmuch as leasing company failed to comply with notice provision of UCC § 9-504(3) before selling repossessed vehicle, it was precluded from recovering deficiency judgment and could only recover sums owed to it prior to repossession as well as repossession charges. Avis Rent-A-Car Sys. v. Franklin, 82 Misc. 2d 66 (1975).

Equipment lease transactions were security agreements under UCC § 1-201(37), and leasing corporation was "financing agency" and not seller of equipment under UCC § 2-104(2), where persons desirous of purchasing equipment or machinery applied to corporation for purchase money loan, corporation made commitments to advance money necessary for payment to manufacturer, plus sales tax, equipment was shipped by manufacturer directly to purchaser and invoice was sent to corporation, purchaser and corporation thereupon entered into security agreements in form of equipment leases with options to purchase at nominal extra charge, UCC financing statements were thereupon executed and delivered to purchaser and filed by corporation, corporation did not select or inspect any equipment, corporation did not maintain warehouse for storage of equipment or machinery, corporation did not carry leased property as assets on books or take any depreciation deductions, and corporation never took possession of any of leased equipment at end of leased term. In re Sherwood Diversified Services, Inc., 382 F. Supp. 1359 (S.D.N.Y. 1974).

In suit by lessor against lessees and guarantor on agreement designated as lease covering certain irrigation equipment for recovery of deficiency after repossession and sale of equipment, evidence was insufficient to support implied findings and judgment based thereon that transaction was lease not subject to UCC requirements where, although lease did not contain option to purchase, letter which was sufficiently identified as being applicable to lease agreement extended option to purchase to lessee and UCC § 1-201(37) makes no requirement that option to purchase be in body of lease contract, and where no evidence was offered as to fair market value of equipment at time purchase option may be exercised nor evidence as to depreciation schedule and anticipated useful life of equipment nor evidence as to whether rental payments were indicative of customary rental rates for similar equipment or were indicative of acquisition of equity in equipment from which court could determine whether consideration for exercise of option was nominal or substantial or determine party's intention as to whether purported lease agreement was to operate as security. Davis Bros. v. Misco Leasing, Inc., 508 S.W.2d 908, 76 A.L.R.3d 1 (Tex. Civ. App. 1974).

Lease of radio equipment for five years at agreed price, with title to property remaining in lessor and with possession of equipment to be returned to lessor at expiration of lease, did not constitute "security interest"; thus, Article 9 of Code did not apply and parties' conduct was governed by terms of lease, which did not require sale of equipment upon default, nor crediting proceeds of sale against lessee's indebtedness, but instead provided that upon default lessor could retain all payments made and recover full unpaid balance of term rental. McGuire v. Associ-

ates Capital Servs. Corp., 133 Ga. App. 408, 210 S.E.2d 862 (1974).

Financing statement containing signatures of debtor and secured party, address of secured party, and containing description of collateral: "All Olivetti Corp. of America copying machines which have been delivered but not paid in full" met sufficiency test of description of collateral under UCC § 9-110 and formal requisites of financing statement under UCC § 9-402 and description reflected security interest under UCC § 1-201(37). First Nat'l Bank & Trust Co. v. Olivetti Corp. of Am., 130 Ga. App. 896, 204 S.E.2d 781 (1974).

Lease was "one intended for security" and, hence, was security agreement as defined by UCC § 1-201(37), rather than true lease, where, inter alia, lessee had option to purchase, had right to apply 93% of rentals against purchase price of equipment, and was liable for full rental for entire minimum period though property was returned to lessor; since lessor did not file financing statement covering leased equipment, its rights were subordinate to those of creditors of lessee who obtained perfected security interest in equipment. Percival Constr. Co. v. Miller & Miller Auctioneers, Inc., 387 F. Supp. 882 (W.D. Okla. 1973), aff'd, 532 F.2d 166 (10th Cir. Okla. 1976).

Surety claiming under terms of performance bond application was not entitled to equitable lien proceeds from sale of contractor's personal property, and did not have contract right but only security interest which it was required to file and perfect. Aetna Cas. & Sur. Co. v. J.F. Brunken & Son, 357 F. Supp. 290 (D.S.D. 1973).

Lessor of citrus packing equipment was entitled to return of its property from trustee in bankruptcy for lessee, where lease agreement contained no evidence of intent to reserve security interest and contained no provisions whereby lessee was to be entitled to purchase equipment at expiration of term. DeVita Fruit Co. v. FCA Leasing Corp., 71 Ohio Op. 2d 525, 473 F.2d 585 (6th Cir. Ohio 1973).

Lease which provided defendant with option to renew for trifling yearly rental, which for all practical purposes amounted to making defendant owner of machine at end of lease for nominal consideration until total obsolescence, was intended for security within meaning of UCC § 1-210(37). Leasco Data Processing Equip. Corp. v. Starline Overseas Corp., 74 Misc. 2d 898 (1973), aff'd, 45 A.D.2d 992, 360 N.Y.S.2d 199 (1st Dep't 1974), appeal dismissed, 35 N.Y.2d 645 (1974), appeal dismissed, 35 N.Y.2d 963, 365 N.Y.S.2d 179, 324 N.E.2d 557 (1974).

Where consideration to be paid if option to purchase was exercised amounted to approximately 4 percent of total consideration payable under truck lease agreement, finding that lease was intended for security was correct. Crowder v. Allied Inv. Co., 190 Neb. 487, 209 N.W.2d 141 (1973).

Where plaintiff and defendant entered into agreement which purported to be lease of accounting machine manufactured by third party, where agreement provided that defendant would make 60 monthly payments $150.05 to plaintiff and that at end of lease period, five years, defendant would have option to purchase machine for 10 percent of its initial cost, and where defendant defaulted after making nine payments, plaintiff replevied machine, sold it at private sale, and brought action against defendant to recover balance due under lease, trial court did not err in finding that transaction was lease, not security interest, that it was not subject to UCC Article 9, and that plaintiff was entitled to deficiency judgment, notwithstanding plaintiff failed to notify defendant of sale pursuant to UCC § 9-504(3); without evidence of market value of machine at termination of lease, it could not be said that option to purchase for 10 percent of original purchase price was option to purchase for "nominal consideration" within meaning of UCC § 1-201(37). Granite Equip. Leasing Corp. v. Acme Pump Co., 165 Conn. 364, 335 A.2d 294 (1973).

Where party intended that seller's retention of title to equipment would secure buyer's payment of purchase price, retention of title was limited by Code § 2-401(1) to reservation of security interest, and contract created security interest as defined in Code § 1-201(3). Witmer v. Kleppe, 469 F.2d 1245 (4th Cir. W. Va. 1972).

An option given to the lessee to purchase the leased property for a nominal consideration does not make the lease one intended for security. James Talcott, Inc. v. Franklin Nat'l Bank, 292 Minn. 277, 194 N.W.2d 775 (1972).

Words of UCC § 1-201(37) are unequivocal, namely that an option given to a lessee to purchase leased property for a nominal consideration does make the lease one intended for security, and hence, where options to buy construction equipment for the combined sum of $2, were nominal in amount when compared to the total rental of $73,000, security interests were created. James Talcott, Inc. v. Franklin Nat'l Bank, 292 Minn. 277, 194 N.W.2d 775 (1972).

Agreement providing that for a term of 36 months, a so-called lessee was required to pay what termed rental; that the lessee could extend the term for succeeding 12 months period at annual rentals; that at the end of the term, the lessee had an option to sell the equipment with any proceeds of the sale in excess of the present value of the payments provided for for the 36 months period and remaining unpaid going to the lessee; and that in event of default by lessee, he agreed to surrender possession of equipment to the lessor who might accept the equipment in final settlement or sell it and hold lessee for any deficiency of the amount due under the 36 months rental period, was a security agreement and not a lease. John Deere Co. v. Wonderland Realty Corp., 38 Mich. App. 88, 195 N.W.2d 871 (1972).

"Equipment lease" which required so-called lessee to pay what was termed rental in quarterly or annual increments over 36 month term which lessee could extend for succeeding 12 month period at additional annual rental, and which gave lessee option to sell equipment at end of term, to receive any proceeds of sale in excess of present value of rental payments remaining unpaid, to bid as high as necessary to become successful bidder at sale without paying more than rental payments remaining unpaid, and which gave lessor upon default right to accept equipment in final settlement or sell it and hold lessee for any deficiency of amount of rental payments due was security agreement and not lease. John Deere Co. v. Wonderland Realty Corp., 38 Mich. App. 88, 195 N.W.2d 871 (1972).

Where promissory note for unpaid balance of corporate stock remained unpaid, document constituted assignment of buyer's interest in corporate stock and was security agreement within UCC § 1-201(37). Gamble v. Hinds, 10 Cal. App. 3d 1021 (2d Dist. 1970).

Security agreement describing collateral but containing no indication of obligation for which collateral was security and containing no agreement to grant a security interest could not be considered "security agreement" within UCC § 1-201(37) definition. Needle v. Lasco Indus., Inc., 10 Cal. App. 3d 1105 (2d Dist. 1970).

Where reservation of title to gasoline had no other purpose than to secure payment for gasoline delivered, such reservation of title constituted "security interest". Mann v. Clark Oil & Ref. Corp., 302 F. Supp. 1376 (E.D. Mo. 1969), aff'd, 425 F.2d 736 (8th Cir. Mo. 1970).

Although agreements were called leases, trial court was correct in finding that they were security agreements since they contained provisions conferring right to purchase equipment at any time during 60-month term of leases for some of $58,000 less 75 percent of all sums paid as rental at rate of $1,288 per month, indicating that purchase option available at end of term was for $40, which was "nominal consideration", relative to $58,000. Stanley v. Fabricators, Inc., 459 P.2d 467 (Alaska 1969).

Where inclusion of option to purchase exists in lease only to protect lessee in case lessor ceases business activities, this factor alone will not make lease security interest. First Nat'l Bank & Trust Co. v. Smithloff, 119 Ga. App. 284, 167 S.E.2d 190 (1969).

A floor plan security agreement did not cover any cars owned by third persons which were merely in the temporary possession of the dealer, as an agent, for sale purposes in which the dealer's only interest was in a commission in the event that a sale was consummated. Cosgriff v. Liberty Nat'l Bank & Trust Co., 58 Misc. 2d 884 (1968).

A security interest is an interest in property which secures payment for the

performance of an obligation. Under Article 9 the UCC does not adopt a title or lien theory of security interests, and rights and obligations and remedies are not determined by the location or the title, but rather on function, compliance with statutory requirements, and the nature of the transaction. Chrysler Credit Corp. v. Sharp, 56 Misc. 2d 261 (1968).

Where an instrument is called a lease, does not contain any option to purchase, and provides merely for an option to renew upon continuing to make substantial payments, the relationship is in fact a lease and not a security agreement. Sanders v. National Acceptance Co. of Am., 383 F.2d 606 (5th Cir. Ga. 1967).

An actual lease of personal property which does not give the lessee any right to acquire or purchase is not a security device and accordingly, the lessee's rights after the lessor's repossession upon his default are not determined by Article 9 of the Code. Franklin Nat'l Bank v. Katzel, 4 U.C.C. Rep. Serv. 124 (1967, NY Sup).

A lease intended as security is one which has the ultimate intent of a sale. In re Atlanta Times, Inc., 259 F. Supp. 820 (N.D. Ga. 1966), aff'd, 383 F.2d 606 (5th Cir. Ga. 1967).

A lease of newspaper composing room equipment specifically stating it contained the entire agreement between the parties, providing that lessee acquired no interest in leased property except that of use, and giving lessor right to demand and take possession of property on termination of lease or in event of default was a bona fide lease, and lessor was not required to file a financing statement to preserve its right of possession after default. In re Atlanta Times, Inc., 259 F. Supp. 820 (N.D. Ga. 1966), aff'd, 383 F.2d 606 (5th Cir. Ga. 1967).

A financing statement executed on behalf of corporate debtor by a duly authorized officer who failed to show the capacity in which he signed, which was indexed solely in the names of the corporate creditor and debtor, substantially complied with the provisions of § 9-402. Plemens v. Didde-Glaser, Inc., 244 Md. 556, 224 A.2d 464 (1966).

A lease of a machine priced at over $8,000 which contained an option to purchase under which the lessee could apply the monthly rental payments up to 75 percent of the value of the machine against the ultimate purchase price is not a security interest because the requirement that 25 percent of the purchase price be paid in cash clearly indicated that title would not be transferred for "a nominal consideration." In re Wheatland Elec. Prods. Co., 237 F. Supp. 820 (W.D. Pa. 1964).

Since state highway department's obligation to a partner for his share of the work done by the partnership on a completed highway construction project was not a contract right but was an account, an absolute assignment of the contract right to a co-partner for the payment of a past due obligation was not a security transaction. Spurlin v. Sloan, 368 S.W.2d 314 (Ky. 1963).

A lease which provides that payments or parts of payments thereunder shall be applied to the payment of the purchase price creates a security interest since upon compliance with the terms of the lease the lessee shall become or has the option of becoming the owner of the property for no additional consideration or a nominal payment. United Rental Equip. Co. v. Potts & Callahan Contracting Co., 231 Md. 552, 191 A.2d 570 (1963).

A lease purchase agreement is a "security interest created by contract" if it specifies that a stated percentage of the rental is to be applied to the purchase price of the property. United Rental Equip. Co. v. Potts & Callahan Contracting Co., 231 Md. 552, 191 A.2d 570 (1963).

The fact that a debtor has the power to terminate the relationship by not making further payments does not preclude the relationship from being a security agreement where as long as the debtor makes the payments and otherwise complies with the terms of the agreement the relationship will continue and the debtor will ultimately obtain the title. United Rental Equip. Co. v. Potts & Callahan Contracting Co., 231 Md. 552, 191 A.2d 570 (1963).

A transaction by which the purchaser of an automobile executed a security agreement to a bank and the president of the automobile seller executed a security note to the bank (the transaction appearing to

be the obligation of the president individually) could be shown to have been a "dealer" transaction where the bank customarily dealt with the seller in this way and had no transactions with the president in his individual capacity, and the bank issued its check in the transaction to the seller and not the president and gave the seller the usual dealer's discount. Provident Tradesmens Bank & Trust Co. v. Pemberton, 24 Pa. D. & C.2d 720 (1961), aff'd, 196 Pa. Super. 180, 173 A.2d 780 (1961).

An automobile manufacturer who delivered automobiles to its authorized dealer with reservation of title until actual payment therefor has the status of a holder of a security interest, and, where it failed to perfect such security interest, its interest is subordinate to the receiver of the dealer, who, as a lien creditor, is without notice of such unperfected security interest. Girard Trust Corn Exch. Bank v. Warren Lepley Ford, Inc., 12 Pa. D. & C.2d 351 (1957).

Where a bank, under its wholesale credit plan, financed the purchase of automobiles by a dealer, which for automobiles to be used in its business, executed installment sales contracts as both buyer and seller, the subsequent acceptance of an assignment of such installment sales contracts by the bank constituted a novation whereby financing under the installment contract was substituted for financing under the wholesale credit plan and the bank became the holder of a security interest in the vehicles within the meaning of § 1-201(37). Girard Trust Corn Exch. Bank v. Warren Lepley Ford, Inc., 13 Pa. D. & C.2d 119 (1957).

The clause of a real estate mortgage which extends the coverage of the mortgage to things which are used in the operation of the business on the mortgaged premises gives the mortgagee security but it is not security interest within the Code because it relates to a real estate mortgage which is expressly excluded from the Code, and it is not to be brought within the Code merely because it happens to contain provisions relating to attached personal property. In re Royer's Bakery, 55 Berks C.L.J. 164 (Pa).

A "security interest" is generally defined as "an interest in personal property or fixtures which secures payment or performance of an obligation." In re Royer's Bakery, 55 Berks C.L.J. 164 (Pa).

§ 75-1-204. Value.

Except as otherwise provided in Articles 3, 4, and 5, a person gives value for rights if the person acquires them:

(1) In return for a binding commitment to extend credit or for the extension of immediately available credit, whether or not drawn upon and whether or not a charge-back is provided for in the event of difficulties in collection;

(2) As security for, or in total or partial satisfaction of, a preexisting claim;

(3) By accepting delivery under a preexisting contract for purchase; or

(4) In return for any consideration sufficient to support a simple contract.

SOURCES: Former § 75-1-204 [Codes, 1942, § 41A:1-204; Laws, 1966, ch. 316, § 1-204, eff March 31, 1968; Repealed by Laws, 2010, ch. 506, § 44, eff from and after July 1, 2010] is now found in comparable provisions at §§ 75-1-205 and 75-1-302(b), enacted by Laws, 2010, ch. 506, § 3, eff from and after July 1, 2010; Present § 75-1-204 is derived from former § 75-1-201(44) [Codes, 1942, § 41A:1-201; Laws, 1966, ch. 316, § 1-201; Laws, 1977, ch. 452, § 2; Laws, 1990, ch. 384, § 45; Laws, 1992, ch. 420, § 69; Laws, 1994, ch. 445, § 3; Laws, 2001, ch. 495, § 5; Laws, 2006, ch. 527, § 41; Laws, 2007, ch. 355, § 34; Laws, 2007, ch. 381, § 34, eff from and after passage (approved Mar. 15, 2007);

Repealed by Laws, 2010, ch. 506, § 44, eff from and after July 1, 2010] and was enacted by Laws, 2010, ch. 506, § 3, eff from and after July 1, 2010.

Editor's Note — A former § 75-1-204 [Codes, 1942, § 41A:1-204; Laws, 1966, ch. 316, § 1-204, eff March 31, 1968; Repealed, Laws, 2010, ch. 506, § 44, eff July 1, 2010] related to reasonable time and seasonableness. For present similar provisions, see § 75-1-205.

JUDICIAL DECISIONS

I. UNDER CURRENT LAW.

1.-5. [Reserved for future use.]

II. UNDER FORMER § 75-1-201.

6. Value.

I. UNDER CURRENT LAW.

1.-5. [Reserved for future use.]

II. UNDER FORMER § 75-1-201.

6. Value.

A lender's forbearance from bringing suit to recover for the borrower's selling of vehicles out of trust so that the borrower could remain in business and repay the money that he owed to the lender constituted the giving of "value" for the purpose of attachment of the lender's security interest. Ford Motor Credit Co. v. State Bank & Trust Co., 571 So. 2d 937 (Miss. 1990).

In action by unpaid credit seller of oil supplies to debtor against bank, which held perfected security interest in debtor's oil inventory, for lack of good faith in disposing of part of such inventory, court held (1) that under UCC § 2-702(3), plaintiff's right to reclaim oil supplies sold to debtor was subject to bank's right to dispose of such supplies, which were collateral for bank's loan to debtor, as good-faith purchaser for value under UCC § 2-403(1); (2) that under UCC § 1-201(44)(b), bank had given value for debtor's oil inventory which bank obtained under after-acquired property clause in debtor's security agreement; (3) that UCC definition of good-faith purchaser did not, expressly or impliedly, include as element of such definition lack of knowledge of third-party claims, since good faith is merely defined in UCC § 1-201(19) as "honesty in fact in transaction concerned"; and (4) that under circumstances of case, bank's knowledge that plaintiff was unpaid credit seller to debtor did not impair bank's good faith in disposing of debtor's oil inventory (collateral) to satisfy debtor's obligation to bank. Shell Oil Co. v. Mills Oil Co., 717 F.2d 208 (5th Cir. 1983).

Where (1) first corporation obtained financing from Texas bank for purchase of five airplanes, which it intended to resell, and Texas bank, in November, 1972, filed separate chattel mortgage for each plane with Federal Aviation Administration pursuant to federal law, (2) second corporation purchased the five planes from the first corporation and borrowed $18,000 from Kentucky bank on unsecured note to finance purchase, (3) second corporation, on default in payment for planes, entered into new agreement with first corporation for purchase of only one plane and return of other four, and also agreed not to file bill of sale with Federal Aviation Administration for plane purchased, (4) second corporation gave Kentucky bank, which held second corporation's unsecured note for $18,000, security agreement which secured repayment of note by encumbering single plane purchased, and bank, in exchange for such security agreement, agreed not to sue on note and filed both security agreement and bill of sale for plane with Federal Aviation Administration, (5) second corporation defaulted in making payments on plane, and first corporation foreclosed on plane and sold it at auction under authority of its November, 1972 security agreement with Texas bank, which security agreement had been assigned to first corporation on its repayment of amount that it owed Texas bank, and (6) second corporation's financer (Kentucky bank) sued first corporation for wrongful interference with its collateral by not respecting bank's lien on repossessed plane, court held (1) that Kentucky bank, under UCC § 1-201(44)(b), gave

"value" when it took security interest in plane purchased by second corporation to secure bank's preexisting claim against such corporation, (2) that by virtue of UCC § 9-204(1), Uniform Commercial Code does not require that "consideration" in strict-law sense be given as prerequisite for security interest to attach to collateral, (3) that Kentucky bank's security interest attached at time it gave value and was duly and properly perfected when bank filed instruments with Federal Aviation Administration, (4) that first corporation, under UCC § 1-201(37), had no valid security interest in plane that it repossessed and sold, since first corporation, by discharge of obligation underlying its security interest, had extinguished such security interest, and (5) that first corporation's foreclosure on, and sale of, plane was wrongful and in derogation of rights of plaintiff Kentucky bank, which held valid security interest in plane. Bank of Lexington v. Jack Adams Aircraft Sales, Inc., 570 F.2d 1220 (5th Cir. 1978).

Brokerage firm which received stock for account of customer and promptly credited sales price to customer's account acquired stock in partial satisfaction of preexisting claim (UCC § 1-201, subd 44(b)), and thus for value within meaning of UCC § 8-302. Colonial Sec., Inc. v. Merrill Lynch, Pierce, Fenner & Smith Inc., 461 F. Supp. 1159 (S.D.N.Y. 1978).

In action by finance corporation against bank involving conflicting security interests in same automobile, where (1) dealer's invoice recited sale of automobile to wife and provided that she would pay $1,400 down and finance balance with plaintiff, (2) wife and husband executed (a) promissory note evidencing loan in amount of $2,995 from defendant, of which $1,400 was used as down payment for automobile and balance represented preexisting debt owed to defendant, and (b) security agreement which designated automobile as security for such loan, (3) husband, on giving dealer $1,400 down payment for automobile, executed installment sale contract in husband's name only in favor of dealer, which dealer assigned to plaintiff, (4) defendant on August 9, 1972 filed financing statement that designated both husband and wife as debtors, (5) plaintiff on August 10, 1972 filed financing statement that designated only husband as debtor, (6) husband defaulted on payments due plaintiff, and (7) both husband and wife defaulted on note given to defendant, court held (1) installment sale contract assigned to plaintiff served as security agreement under UCC § 9-203(1)(b) and plaintiff acquired valid security interest in automobile, (2) plaintiff's security interest in automobile validly attached under UCC § 9-204(1), since husband had "right" in automobile as matter of law and could use it for collateral, even though wife was vehicle's registered owner, (3) under UCC § 9-402(1) and § 9-105(1)(d) financing statement filed by plaintiff was defective, since it only listed husband as "debtor" and did not refer to wife who actually owned automobile, (4) defendant's security interest validly attached when both husband and wife signed security agreement granting security interest in automobile to defendant, (5) defendant's financing statement complied with UCC § 9-402(1), since it was signed by both husband and wife, and thus defendant's security interest in automobile was perfected, and (6) since defendant gave "value" under UCC § 1-201(44)(b) by taking security interest in automobile to secure defendant's preexisting claim, defendant's perfected security interest in vehicle extended to entire amount of defendant's loan to husband and wife, and such perfected security interest was superior to plaintiff's unperfected security interest. GMAC v. Washington Trust Co., 120 R.I. 197, 386 A.2d 1096, 3 A.L.R.4th 496 (1978).

Notwithstanding subsequent purchaser did not know that intermediate seller's title was voidable due to intermediate seller's obtaining truck on basis of check which was dishonored, subsequent purchaser did not have good title against original seller by status of "good faith purchaser for value" under UCC §§ 1-201(19), 1-201(44) and 2-403, where subsequent purchaser knew that intermediate seller was sophisticated about value of automotive equipment, subsequent purchaser had just received three dishonored checks from intermediate seller, subsequent purchaser had no reason to believe

that intermediate seller would give equipment worth $13,500 or more to settle debt of $9,100, and subsequent purchaser let intermediate seller retain possession of truck. Graves Motors, Inc. v. Docar Sales, Inc., 414 F. Supp. 717 (E.D. La. 1976).

Where debtor delivered shares of stock to bank as security for various loans, but obtained possession of stock from bank under false pretenses and then transferred stock to his father-in-law for purpose of securing or indemnifying father-in-law against any loss which he might sustain as result of his having signed indemnity agreement on behalf of debtor: (1) under UCC § 1-201(44), value was given for transfer of stock when father-in-law accepted stock as security for preexisting claim, i. e., debtor's contingent liability to contribute if father-in-law paid more than his proportionate share of obligation under indemnity agreement; (2) father-in-law was bona fide purchaser under UCC § 8-302; and (3) under UCC § 8-301(2), he acquired stock free of bank's adverse claim. Prisbrey v. Noble, 505 F.2d 170 (10th Cir. Utah 1974).

In action to recover value of stock certificates which were stolen from broker, accepted by bank as collateral for loan, and subsequently sold to satisfy debt, testimony by bank president that, inter alia, prospective borrower offered certificates as collateral for loan, that certificates were issued to and endorsed by broker with transferee's name left blank, that borrower executed affidavit stating that he was rightful owner of certificates, that bank contacted issuing corporation and verified listing of stock in broker's name, and that bank sent certificates with borrower's name added as transferee to issuing corporation for issuance of new certificates in borrower's name, which were issued and held by bank, established prima case that bank was bona fide purchaser of stock certificates under UCC § 8-302; bank became "purchaser for value" when it accepted stock certificates as collateral. Fidelity & Cas. Co. v. Key Biscayne Bank, 501 F.2d 1322 (5th Cir. Fla. 1974), reh'g denied, 504 F.2d 760 (5th Cir. Fla. 1974).

In transaction whereby sole shareholder of small corporation sold all his shares of stock to third person and corporation participated in transaction with purchaser as comaker of promissory note and written security agreement relating to corporate shares and various physical assets of corporation, corporation's execution of promissory note and security agreement was supported by sufficient consideration since seller, as part of sale transaction, agreed to refrain from competition with corporation, granted corporation option to purchase building in which business was conducted, and promised to remain on corporation's board of directors. Miller's Shoes & Clothing v. Hawkins Furn. & Appliances, Inc., 300 Minn. 460, 221 N.W.2d 113, 71 A.L.R.3d 629 (1974).

Section 1-201(44)(b) provides that an antecedent debt is sufficient consideration for the execution and giving of a security interest. United States v. Pirnie, 339 F. Supp. 702 (D. Neb. 1972), aff'd, 472 F.2d 712 (8th Cir. Neb. 1973).

Automobile dealer who obtained automobiles from seller in exchange for two uncollectible checks previously issued to dealer by seller was "purchaser for value" of automobiles. National Car Rental v. Fox, 18 Ariz. App. 160, 500 P.2d 1148 (1972).

"Value" is given for rights if they are acquired as security for preexisting debt. United States v. Big Z Whse., 311 F. Supp. 283 (S.D. Ga. 1970).

§ 75-1-205. Reasonable time; seasonableness.

(a) Whether a time for taking an action required by the Uniform Commercial Code is reasonable depends on the nature, purpose, and circumstances of the action.

(b) An action is taken seasonably if it is taken at or within the time agreed or, if no time is agreed, at or within a reasonable time.

SOURCES: Former § 75-1-205 [Codes, 1942, § 41A:1-205; Laws, 1966, ch. 316, § 1-205, eff March 31, 1968; Repealed by Laws, 2010, ch. 506, § 44, eff from and after July 1, 2010] is now found in comparable provisions at § 75-1-303, enacted by Laws, 2010, ch. 506, § 3, eff from and after July 1, 2010; Present § 75-1-205 is derived from former § 75-1-204(2) and (3) [Codes, 1942, § 41A:1-204; Laws, 1966, ch. 316, § 1-204, eff March 31, 1968; Repealed by Laws, 2010, ch. 506, § 44, eff from and after July 1, 2010] and was enacted by Laws, 2010, ch. 506, § 3, eff from and after July 1, 2010.

Editor's Note — A former § 75-1-205 [Codes, 1942, § 41A:1-205; Laws, 1966, ch. 316, § 1-205, eff March 31, 1968; Repealed, Laws, 2010, ch. 506, § 44, eff July 1, 2010] related to course of dealing and usage of trade. For present similar provisions, see § 75-1-303.

JUDICIAL DECISIONS

I. UNDER CURRENT LAW.

1. -10. [Reserved for future use.]

II. UNDER FORMER § 75-1-204.

11. In general.
12. Question of law or fact.
13. Express time provision.
14. —"Manifestly unreasonable".
15. Particular acts; in general.
16. —Acceptance.
17. —Inspection.
18. —Negotiation.
19. —Rejection or revocation.
20. Particular circumstances; disability of party.

I. UNDER CURRENT LAW.

1. -10. [Reserved for future use.]

II. UNDER FORMER § 75-1-204.

11. In general.

Reasonable time for taking any action is dependent on the nature, purpose and circumstances of the action. White Devon Farm v. Stahl, 88 Misc. 2d 961 (1976).

12. Question of law or fact.

Where facts are not substantially in dispute, question of what is a reasonable time to inspect and reject goods that fail to conform to contract specifications is a matter to be resolved by the court. White Devon Farm v. Stahl, 88 Misc. 2d 961 (1976).

Whether goods were substantially impaired by nonconformity under UCC § 2-608(1) and whether buyer's revocation of acceptance under UCC § 2-608(2) was given within reasonable time are questions of fact for jury. Under UCC § 1-204(2), what is reasonable time for taking any action under the code depends on nature, purpose, and circumstances of such action. Conte v. Dwan Lincoln-Mercury, Inc., 172 Conn. 112, 374 A.2d 144 (1976).

Reasonableness is primarily a question for the fact finder. Hane v. Exten, 255 Md. 668, 259 A.2d 290 (1969).

13. Express time provision.

Where contract between manufacturer and distributor for sale of certain product was to run for "initial term," defined to commence on date of execution and to "continue for a period of 12 months from the date of the first shipment" of specified product, and granted distributor right to renew for successive 12-month periods provided distributor maintained certain level of purchases, but where no such specified product was shipped or ordered prior to manufacturer's repudiation of contract a little more than one year after execution of contract, "initial term," and thus contract, did not expire one year after date of execution; question as to what constituted "reasonable time" for distributor's performance under contract depended upon circumstances of transaction and course of performance and, in view of dispute which had arisen between parties, it was not unreasonable for distributor to refrain from ordering specified product until contract renegotiations were resolved. Copylease Corp. of Am. v. Memorex Corp., 403 F. Supp. 625 (S.D.N.Y. 1975).

Where a sales contract expressly creates an unlimited express warranty of

merchantability which in a separate clause purports to indirectly modify the warranty without expressly mentioning the word merchantability, the language creating the unlimited express warranty must prevail over the time limitation insofar as the latter modifies the warranty, and the express warranty of merchantability includes latent shading defects and defendants may claim for such defects not reasonably discoverable within the time limits established by the contract if plaintiff was notified of these defects within a reasonable time after they were or should have been discovered. Wilson Trading Corp. v. David Ferguson, Ltd., 23 N.Y.2d 398, 244 N.E.2d 685 (1968).

This section permits parties to a contract of sale and purchase to fix the time within which notice of defective goods must be given by seller to purchaser so long as the time is reasonable. Q. Vandenberg & Sons v. Siter, 204 Pa. Super. 392, 204 A.2d 494 (1964).

14. —"Manifestly unreasonable".

Notwithstanding contract specified that buyer had thirty days to inspect fabricated pipe, which constituted goods within meaning of UCC § 2-105, trial court erred in holding buyer's performance bond liable by reason of buyer's failure to reject allegedly defective pipe within thirty days of delivery: (1) under UCC § 2-607, buyer was required to notify seller of breach of warranty within a reasonable time after actual or constructive discovery of defects; (2) UCC § 1-204 provides that whenever UCC requires action within reasonable time, any time which is not manifestly unreasonable may be fixed by agreement; (3) seller guaranteed workmanship and material in contract provided claim was made within one year from shipment; and (4) buyer made claim within one year following shipment. United States Fid. & Guar. Co. v. North Am. Steel Corp., 335 So. 2d 18 (Fla. App. 1976).

A time limitation providing that a buyer unqualifiedly accepts all material and waives all claims in respect thereto unless he gives notice of a claim within 15 days after delivery is "manifestly unreasonable" and invalid when applied to latent defects not discoverable on ordinary inspection within the 15-day time limitation. Neville Chem. Co. v. Union Carbide Corp., 294 F. Supp. 649 (W.D. Pa. 1968), vacated on other grounds, 422 F.2d 1205 (3d Cir. Pa. 1970), cert. denied, 400 U.S. 826, 91 S. Ct. 51, 27 L. Ed. 2d 55 (1970).

15. Particular acts; in general.

Contract under which seller agreed to manufacture cooling systems for incorporation into electronic countermeasure (ECM) pods for United States Air Force was breached by buyer when it failed to furnish seller with source-control drawings for such systems within commercially reasonable time implied in contract by UCC § 2-309(1) and UCC § 1-204(2). Westinghouse Elec. Corp. v. Garrett Corp., 437 F. Supp. 1301 (D. Md. 1977), aff'd, 601 F.2d 155 (4th Cir. Md. 1979).

Where contract between manufacturer and distributor for sale of certain product was to run for "initial term," defined to commence on date of execution and to "continue for a period of 12 months from the date of the first shipment" of specified product, and granted distributor right to renew for successive 12-month periods provided distributor maintained certain level of purchases, but where no such specified product was shipped or ordered prior to manufacturer's repudiation of contract a little more than one year after execution of contract, "initial term," and thus contract, did not expire one year after date of execution; question as to what constituted "reasonable time" for distributor's performance under contract depended upon circumstances of transaction and course of performance and, in view of dispute which had arisen between parties, it was not unreasonable for distributor to refrain from ordering specified product until contract renegotiations were resolved. Copylease Corp. of Am. v. Memorex Corp., 403 F. Supp. 625 (S.D.N.Y. 1975).

Where default occurred in payment of an automobile retail instalment contract in August of 1965 but the security holder did not make demand upon the dealer for performance of its repurchase agreement until October of 1966, and it was the custom and usage that the lending institution is required to repossess and return the vehicle for repurchase within a reasonable time after default and that 90

days is regarded as a reasonable time, the security holder could not enforce the repurchase agreement which contained no provision inconsistent with the custom and usage. Valley Nat'l Bank v. Babylon Chrysler-Plymouth, Inc., 53 Misc. 2d 1029 (1967), aff'd, 28 A.D.2d 1092, 284 N.Y.S.2d 849 (2d Dep't 1967).

16. —Acceptance.

Where contract for sale of tractor was not complete until defendant accepted by picking up tractor, and defendant did not inform seller that he had picked up tractor until approximately two to four weeks after he had done so, evidence would support finding that defendant failed to give notice of his acceptance within reasonable time, permitting seller to treat offer as having lapsed under Code § 2-206(2). Petersen v. Thompson, 264 Or. 516, 506 P.2d 697 (1973).

17. —Inspection.

There is no inflexible rule that the time to inspect goods to determine their conformance with contract specifications must coincide with passage of title. White Devon Farm v. Stahl, 88 Misc. 2d 961 (1976).

18. —Negotiation.

Where letter of credit provided that drafts issued against it must be negotiated by specified date and that the credit was subject to the Uniform Customs And Practice for Documentary Credits (1962 revision), and where provision of Uniform Customs And Practice for Documentary Credits stated only that documents must be presented within "reasonable time" after issuance, court, in holding that timeliness of presentment of draft was issue of material fact, would take note of UCC § 1-204(2), dealing with reasonableness of time for taking any action, and UCC § 3-503(2), dealing with time for presenting commercial paper. Flagship Cruises, Ltd. v. New England Merchants Nat'l Bank, 569 F.2d 699 (1st Cir. Mass. 1978).

19. —Rejection or revocation.

In proceeding based on seller's alleged breach of contract to sell buyer 4,150 tons of Class I steel, which matter was submitted to arbitration governed by Uniform Commercial Code, where arbitrators found that such steel was received for buyer's inspection on November 8, 1974, that buyer did not accept steel because it did not conform to contract of sale, and that buyer orally rejected steel on December 4, 1974, and gave seller written notice of such rejection on December 12, 1974, buyer's rejection was proper and seller received timely notification thereof under UCC § 2-602(1) and UCC § 1-204(2). North Am. Steel Corp. v. Siderius, Inc., 75 Mich. App. 391, 254 N.W.2d 899 (1977).

In action arising out of auction sale of mare described in sales catalog as "barren," but which subsequently "slipped" a dead foal, buyer made effective revocation within reasonable time under UCC §§ 1-204 and 2-608 where buyer wrote letters five days after mare "slipped" to seller and to sales director of organization which conducted sale indicating that the sale should be "null and void" on basis of misrepresentation of mare in sales catalog. Keck v. Wacker, 413 F. Supp. 1377 (E.D. Ky. 1976).

Trial court properly submitted to jury issue of whether buyer revoked acceptance of cattle herd within reasonable time under UCC §§ 1-204 and 2-608 and buyer failed to persuade jury that his revocation occurred within reasonable time, notwithstanding cattle were nonconforming, value of herd was substantially impaired and buyer gave notice of nonconformity 17 days after delivery, where, prior to notice of revocation given 15 months later after failure of adjustment negotiations, herd was underfed, herd suffered weight and death loss, and introduction of bulls into herd caused pretermission of registration. Sylvester v. Watkins, 538 S.W.2d 827 (Tex. Civ. App. 1976), ref. n.r.e. (Nov. 10, 1976).

Mere fact that because of seller's action the passing of title to stud horse was accelerated by some six months did not affect timing of obligation to inspect horse to determine its fitness for breeding purposes or decision to accept or reject the horse since, pursuant to agreement, it was only in the two-month period prior to stated date for passing of title and after end of racing season that seller was to have horse tested to determine his fitness for breeding purposes, actual inspection took place during such time and horse

sustained no serious bodily injury during last months of racing; inspection and rejection in month before title would have passed absent acceleration was timely. White Devon Farm v. Stahl, 88 Misc. 2d 961 (1976).

Whether goods were substantially impaired by nonconformity under UCC § 2-608(1) and whether buyer's revocation of acceptance under UCC § 2-608(2) was given within reasonable time are questions of fact for jury. Under UCC § 1-204(2), what is reasonable time for taking any action under the code depends on nature, purpose, and circumstances of such action. Conte v. Dwan Lincoln-Mercury, Inc., 172 Conn. 112, 374 A.2d 144 (1976).

In action between purchaser of nonconforming mobile home and assignee of security agreement, purchaser's revocation of acceptance occurred within reasonable time under UCC §§ 2-608 and 1-204(2) where purchaser relied on dealer's promises to make corrections while retaining option of cancellation; under UCC § 2-711(1) and (3) purchaser retained security interest in price paid and was allowed to recover so much of price as had been paid. Frontier Mobile Home Sales, Inc. v. Trigleth, 256 Ark. 101, 505 S.W.2d 516 (1974).

Buyers' revocation of acceptance of automobile 9 months after sale of automobile and 7 months after filing of suit for rescission of sale contract was within "reasonable time" when balanced against obligation of automobile dealer under contract. Moore v. Howard Pontiac-American, Inc., 492 S.W.2d 227 (Tenn. Ct. App. 1972).

A reasonable time in which to make a rescission depends on the facts and circumstances of a particular case. Reece v. Yeager Ford Sales, Inc., 155 W. Va. 453, 184 S.E.2d 722 (1971).

Where goods are effectively rejected for breach of warranty, the burden of proving they conform presumably remains on the seller, whereas upon acceptance the buyer has the burden to establish any breach. Miron v. Yonkers Raceway, Inc., 400 F.2d 112 (2d Cir. N.Y. 1968).

20. Particular circumstances; disability of party.

In an action brought to recover for injuries sustained by plaintiff as a result of the unauthorized registration of stock owned by her in the two defendant companies, plaintiff notified each corporate issuer within a reasonable time after she had noticed that her shares had been transferred as a result of forgery as provided by UCC 8-4-4, where it appeared that plaintiff was a 94-year-old woman who, while a guest in a home, had allowed one of her hosts, whom she trusted, to handle her affairs over a 2 year period, and in light of plaintiff's reliance on the perpetrator of the acts which deprived her of title to her securities and in light of her own age and decrepitude, plaintiff could not be charged with unreasonable action in not checking her accounts from time to time and consequently plaintiff did not have required statutory notice of host's dishonesty until she left his residence. Weller v. AT & T, 290 A.2d 842 (Del. 1972).

RESEARCH REFERENCES

ALR. Duty of collecting bank as to time of presentment with respect to draft or bill of exchange for acceptance. 39 A.L.R.2d 1296.

Time within which buyer of goods must give notice in order to recover damages for seller's breach of express warranty. 41 A.L.R.2d 812.

Time, place and manner of buyer's inspection of goods under UCC § 2-513. 36 A.L.R.4th 726.

Am Jur. 11 Am. Jur. 2d, Bills and Notes §§ 322.

15A Am. Jur. 2d, Commercial Code § 26.

17 Am. Jur. 2d, Contracts §§ 478, 479, 480.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Form 2:156 (Instruction to jury; time for shipment or delivery in absence of agreement).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 1 — General Provisions, §§ 253:61 et seq. (Time).

CJS. 13 C.J.S., Carriers §§ 408, 441.

§ 75-1-206. Presumptions.

Whenever the Uniform Commercial Code creates a "presumption" with respect to a fact, or provides that a fact is "presumed," the trier of fact must find the existence of the fact unless and until evidence is introduced that supports a finding of its nonexistence.

SOURCES: Former § 75-1-206 [Codes, 1942, § 41A:1-206; Laws, 1966, ch. 316, § 1-206; Laws, 1996, ch. 468, § 54, eff from and after July 1, 1996] was repealed by Laws, 2010, ch. 506, § 3, eff from and after July 1, 2010. Present 75-1-206 is derived from former § 75-1-201(31) [Codes, 1942, § 41A:1-201; Laws, 1966, ch. 316, § 1-201; Laws, 1977, ch. 452, § 2; Laws, 1990, ch. 384, § 45; Laws, 1992, ch. 420, § 69; Laws, 1994, ch. 445, § 3; Laws, 2001, ch. 495, § 5; Laws, 2006, ch. 527, § 41; Laws, 2007, ch. 355, § 34; Laws, 2007, ch. 381, § 34, eff from and after passage (approved Mar. 15, 2007); Repealed by Laws, 2010, ch. 506, § 44, eff from and after July 1, 2010] and was enacted by Laws, 2010, ch. 506, § 3, eff from and after July 1, 2010.

JUDICIAL DECISIONS

I. UNDER CURRENT LAW.

1.-5. [Reserved for future use.]

II UNDER FORMER § 75-1-201.

6. Presumption or Presumed.

I. UNDER CURRENT LAW.

1.-5. [Reserved for future use.]

II UNDER FORMER § 75-1-201.

6. Presumption or Presumed.

In action to enforce guarantor's liability on promissory note, trial court did not err in instructing jury that sole question was whether or not defendant had signed guarantee agreement where, inter alia, defendant did not raise issue of effectiveness of her signature, where jury was presented with guarantee agreement which contained what appeared to be defendant's signature, raising presumption of genuineness under UCC § 3-307, and where, under UCC § 3-416, guarantee agreement obligated defendant to repay loan, interest, and attorneys' fees. Wolfe v. Madison Nat'l Bank, 30 Md. App. 525, 352 A.2d 914 (1976).

Blanket denials failed to overcome presumption of receipt of goods supported by receipted freight bill, check for freight charges, letter of notification, and actual delivery of merchandise. Eazor Exp., Inc. v. Lanza, 60 Misc. 2d 686 (1969).

§ 75-1-207. Repealed.

Repealed by Laws, 2010, ch. 506, § 44, eff from and after July 1, 2010.

§ 75-1-207. [Codes, 1942, § 41A:1-207; Laws, 1966, ch. 316, § 1-207; Laws, 1992, ch. 420, § 70, eff from and after January 1, 1993].

Editor's Note — Former § 75-1-207 related to performance or acceptance under reservation of rights. Present § 75-1-308 is derived from and contains identical provisions to those found in former § 75-1-207.

§ 75-1-208. Repealed.

Repealed by Laws of 2010, ch. 506, § 44, effective from and after July 1, 2010.

§ 75-1-208. [Codes, 1942, § 41A:1-208; Laws, 1966, ch. 316, § 1-208, eff March 31, 1968]

Editor's Note — Former § 75-1-208 [Codes, 1942, § 41A:1-208; Laws, 1966, ch. 316, § 1-208, eff March 31, 1968], which related to the option to accelerate at will, was repealed by Laws of 2010, ch 506, § 44, effective July 1, 2010.

Part 3.

Territorial Applicability and General Rules.

Sec.

75-1-301. Territorial application of the code; parties' power to choose applicable law.
75-1-302. Variation by agreement.
75-1-303. Course of performance, course of dealing, and usage of trade.
75-1-304. Obligation of good faith.
75-1-305. Remedies to be liberally administered.
75-1-306. Waiver or renunciation of claim or right after breach.
75-1-307. Prima facie evidence by third-party documents.
75-1-308. Performance or acceptance under reservation of rights.
75-1-309. Option to accelerate at will.
75-1-310. Subordinated obligations.

§ 75-1-301. Territorial application of the code; parties' power to choose applicable law.

(a) Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement, the Uniform Commercial Code applies to transactions bearing an appropriate relation to this state. However, the law of the State of Mississippi shall always govern the rights and duties of the parties in regard to disclaimers of implied warranties of merchantability or fitness, limitations of remedies for breaches of implied warranties of merchantability or fitness, or the necessity for privity of contract to maintain a civil action for breach of implied warranties of merchantability or fitness notwithstanding any agreement by the parties that the laws of some other state or nation shall govern the rights and duties of the parties.

(b) Where one (1) of the following provisions of the Uniform Commercial Code specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law (including the conflict of laws rules) so specified:

Rights of creditors against sold goods (Section 75-2-402).

Applicability of the Article on Leases (Sections 75-2A-105 and 75-2A-106).

Applicability of the Article on Bank Deposits and Collections (Section 75-4-102).

Governing law in the Article on Funds Transfers (Section 75-4A-507). Letters of credit (Section 75-5-116).

Applicability of the Article on Investment Securities (Section 75-8-110).

Law governing perfection, the effect of perfection or nonperfection, and the priority of security interests and agricultural liens (Sections 75-9-301 through 75-9-307).

SOURCES: Present § 75-1-301 is derived from former § 75-1-105 [Codes, 1942, § 41A:1-105; Laws, 1966, ch. 316, § 1-105; Laws, 1977, ch. 452, § 1; Laws, 1991, ch. 316, § 1; Laws, 1994, ch. 445, § 2; Laws, 1996, ch. 460, § 19; Laws, 1996, ch. 468, § 53; Laws, 2001, ch. 495, § 4, eff from and after Jan. 1, 2002; Repealed by Laws, 2010, ch. 506, § 44, eff from and after July 1, 2010] and was enacted by Laws, 2010, ch. 506, § 3, eff from and after July 1, 2010.

JUDICIAL DECISIONS

I. UNDER CURRENT LAW.

1.-5. [Reserved for future use.]

II. UNDER FORMER § 75-1-105.

6. In general.
7. Choice of applicable law by agreement.
8. —Reasonable relation.
9. Choice of applicable law in absence of agreement.
10. —Appropriate relation.

I. UNDER CURRENT LAW.

1.-5. [Reserved for future use.]

II. UNDER FORMER § 75-1-105.

6. In general.

In suit by hospital cashier who was injured while operating cash register manufactured by defendant manufacturer-seller after it had been delivered by buyer to hospital, court held, with respect to plaintiff's breach-of-implied-warranty claims, (1) that under Mississippi UCC § 1-105(1), which sets forth specific conflict-of-laws rule for warranty claims, Mississippi law governed the rights and duties of parties with regard to (a) disclaimers of implied warranties of merchantability or fitness, (b) limitation of remedies for breach of such warranties, and (c) necessity of privity of contract to maintain action for breach of warranty; (2) that rule of Mississippi UCC § 1-105(1), as expressly stated therein, applied notwithstanding agreement by parties that laws of another state or of foreign nation governed parties' rights and duties; (3) that under Mississippi UCC § 1-105(1), application of Mississippi substantive law on privity of contract, warranty disclaimers, and limitation of remedies in warranty action was authorized only if transaction that gave rise to warranty claim bore some reasonable and appropriate relation to Mississippi; (4) that facts of case showed that transactions that gave rise to plaintiff's warranty claim did not bear any relation to Mississippi and did not warrant application of Mississippi substantive law; (5) that under conflict-of-law "center-of-gravity" doctrine, Alabama had most significant relation to transactions in suit; (6) that since Alabama's breach-of-warranty statute of limitations (see Alabama UCC § 2-725(1) and (2)) would be regarded as procedural, Mississippi's breach-of-warranty statute of limitations (see Mississippi UCC § 2-725(1) and (2)) governed case; and (7) that under Mississippi UCC § 2-725(1) and (2), plaintiff's warranty claim was barred because tender of delivery of cash register that caused plaintiff's injuries had occurred more than six years before accrual of plaintiff's cause of action. Jackson v. National Semi-Conductor Data Checker/DTS, Inc., 660 F. Supp. 65 (S.D. Miss. 1986).

In action by buyer of computer system for damages for system's failure to function properly, court held (1) that parties' designation under UCC § 1-105(1) of Massachusetts law to govern any claims of breach of their sales contract was immaterial, since such claims were governed by limitation period contained in UCC § 2-725(1), which was adopted by both New York and Massachusetts; (2) that contract in suit was not one for performance of services, as alleged by the buyer, but was one for purchase of goods within meaning of UCC § 2-106(1); (3) that action for breach of contract was not timely commenced by buyer, since breach occurred in January, 1971, and buyer did not commence suit until August 14, 1975, which was more than four years after cause of action accrued; (4) that action for fraud in the inducement was timely commenced, since the applicable statute of limitations under New Yorklaw for such action is either six years from commission of the fraud, or two years from discovery; (5) that UCC § 2-725(2), which deals with warranty that explicitly extends to future performance and provides that discovery of breach must await such performance, did not apply, since warranty under UCC § 2-725(2) must expressly refer to the future and implied warranty alleged by buyer, by its very nature, did not do so; and (6) that seller's attempts to repair computer system did not toll running of statute of limitations prescribed by UCC § 2-725(1). Triangle Underwriters, Inc. v. Honeywell, Inc., 604 F.2d 737 (2d Cir. N.Y. 1979).

In action by buyer of computer system for damages for system's failure to function properly, court held (1) that parties' designation under UCC § 1-105(1) of Massachusetts law to govern their sales contract was immaterial, since buyer's breach-of-contract claims were governed by limitation period contained in UCC § 2-725(1), which had been adopted by both New York and Massachusetts; (2) that contract in suit was not one for performance of services, as alleged by buyer, but was one for purchase of goods within meaning of UCC § 2-106(1); (3) that action was not timely commenced by buyer, since breach had occurred in January, 1971 and buyer did not commence suit until August 14, 1975, which was more than four years after cause of action accrued; (4) that UCC § 2-725(2), which deals with warranty that explicitly extends to future performance and provides that discovery of breach must await such performance, did not apply, since warranty under UCC § 2-725(2) must expressly refer to the future and implied warranty alleged by buyer, by its very nature, did not do so; and (5) that seller's attempts to repair computer system did not toll running of statute of limitations prescribed by UCC § 2-725(1). Triangle Underwriters, Inc. v. Honeywell, Inc., 457 F. Supp. 765 (E.D.N.Y. 1978), rev'd on other grounds, 604 F.2d 737 (2d Cir. N.Y. 1979).

In debtor's action to enjoin creditor from enforcing two security agreements against collateral therefor, where evidence showed (1) that debtor and creditor had entered into such security agreements and that one of them had been perfected in several states, including New Jersey, (2) that second security agreement had in no way diminished validity of first security agreement, (3) that debtor's reason for seeking injunction against enforcement of such security agreements was creditor's alleged oral agreement to refrain from foreclosing on any debts due it in order to allow debtor to attain a healthy operating condition, (4) that creditor, after concluding that debtor could not attain a healthy operating condition, formally declared debtor to be in default under such security agreements and to owe creditor over $27 million in principal debts and (5) that creditor had then accelerated maturity of all of debtor's term obligations and demanded payment of all principal and interest on debtor's demand obligations, court held (1) that debtor's claim of alleged oral agreement to refrain from foreclosure was unsupported by the evidence, (2) that under (a) UCC § 1-105(1), dealing with power of parties to choose law applicable to their transactions, (b) UCC § 9-102(1), which intends that substantive law of place where collateral is located governs without regard to possible contracts in other jurisdictions, and (c) UCC § 9-103, which lays down numerous

choice-of-law rules regarding creation, perfection, and priorities in multistate security-agreement transactions, law of New Jersey governed security agreements in suit, (3) that security interests created by security agreements in suit were valid, (4) that debtor had failed to show any reason for granting injunctive relief against their enforcement and (5) that on debtor's default, creditor under UCC § 9-501(1), as adopted in New Jersey, had right to reduce its claim to judgment and to foreclose on the collateral. Doyle v. Northrop Corp., 455 F. Supp. 1318 (D.N.J. 1978).

Under UCC § 1-105(1), the parties are free to choose the law that they wish to govern the transaction. However, the provisions of Article 9 of the Uniform Commercial Code contain several conflict-of-law rules. Among these rules are transactions to which UCC §§ 9-102(1) and 9-103 apply. In these circumstances, regardless of UCC § 1-105(1), the law governing the transaction will be the mandatory provisions that are stated in UCC §§ 9-102(1) and 9-103. Doyle v. Northrop Corp., 455 F. Supp. 1318 (D.N.J. 1978).

As to sale made in Pennsylvania, Pennsylvania law is controlling as to whether there is a warranty. Duckworth v. Ford Motor Co., 211 F. Supp. 888 (E.D. Pa. 1962), rev'd on other grounds, 320 F.2d 130, 97 A.L.R.2d 806 (3d Cir. Pa. 1963).

The Uniform Commercial Code does not determine what law governs a claim for damages for tort. Folk v. York-Shipley, Inc., 239 A.2d 236 (Del. 1968).

UCC Sec 1-105 has been cited as illustrative of the modern flexible approach to the selection of the applicable law where the question was whether the law of the state where the tort was committed should govern. Casey v. Manson Constr. & Eng'g Co., 247 Or. 274, 428 P.2d 898 (1967).

7. Choice of applicable law by agreement.

The court enforced a forum-selection clause in a contract that called for the application of Louisiana law, notwithstanding the contention that the enforcement of the forum-selection clause would violate the public policy of Mississippi because it would violate the statute, as the Mississippi party to the contract assented to and agreed to sign a form contract printed by the Louisiana party to the contract and made no objections to the contract. Tel-Com Mgt., Inc. v. Waveland Resort Inns, Inc., 782 So. 2d 149 (Miss. 2001).

Under Uniform Commercial Code, parties' contractual choice of law will be upheld unless transaction lacks normal connection with state whose law was selected; thus, only when it is shown that contact did not occur in normal course of transaction, but was contrived to validate parties' choice of law, will relationship be held unreasonable. IHP Indus., Inc. v. PermAlert, Esp., 947 F. Supp. 257 (S.D. Miss. 1996).

It is established principle under UCC § 1-105, that parties to contract may consent, in absence of strong countervailing public policy of state, to law to be applied with respect to contract. Nederlandse Draadindustrie NDI B.V. v. Grand Pre-Stressed Corp., 466 F. Supp. 846 (E.D.N.Y. 1979), aff'd, 614 F.2d 1289 (2d Cir. N.Y. 1979).

Under UCC § 1-105(1), the parties are free to choose the law that they wish to govern the transaction. However, the provisions of Article 9 of the Uniform Commercial Code contain several conflict-of-law rules. Among these rules are transactions to which UCC §§ 9-102(1) and 9-103 apply. In these circumstances, regardless of UCC § 1-105(1), the law governing the transaction will be the mandatory provisions that are stated in UCC §§ 9-102(1) and 9-103. Doyle v. Northrop Corp., 455 F. Supp. 1318 (D.N.J. 1978).

UCC § 1-105(1) affirmatively states the right of the parties to a multistate transaction, or a transaction involving foreign trade, to choose their own law. This right is subject to the firm rules stated in the six UCC sections referred to in UCC § 1-105(2) and is limited to jurisdictions to which the transaction bears a "reasonable relation." Under the test of what is a "reasonable relation," the law chosen is generally that of a jurisdiction wherein a sufficiently significant part of the making or performance of the contract occurred or

will occur. However, an agreement as to choice of law will sometimes take effect as a shorthand expression of the intent of the parties concerning matters governed by their agreement, even though the transaction has no significant contact with the jurisdiction chosen. National Equip. Rental, Ltd. v. Taylor, 225 Kan. 58, 587 P.2d 870 (1978).

Where (1) Navajo Indian purchased pick-up truck from Arizona seller whose place of business was located outside boundaries of Navajo Reservation, (2) purchase price of truck was financed by installment-sale security agreement which provided that validity and construction of agreement would be governed by Arizona law and that secured party should have all rights and remedies for default provided by Arizona Uniform Commercial Code, and (3) seller, on buyer's default in making payments, effected self-help repossession of truck pursuant to UCC § 9-503 within boundaries of Navajo Reservation and without breach of the peace, under UCC § 1-105(1) parties by their contractual choice of Arizona law to govern transaction excluded any possibility that transaction would be affected by provisions of Navajo Tribal Code which prescribed civil penalty for repossessing personal property of Navajo Indians on land subject to jurisdiction of Navajo Tribe where such repossession was not effected with written consent of purchaser at time of repossession. Brown v. Babbitt Ford, Inc., 117 Ariz. 192, 571 P.2d 689, 23 U.C.C. Rep. Serv. 266 (Ct. App. 1977) (holding that since seller had right under Arizona law to do exactly what it did in effecting repossession, no liability therefor attached to seller).

Under Georgia UCC § 1-105(1), Georgia allows contracting parties to make their own choice of the applicable state law. Crompton-Richmond Co. v. Briggs, 560 F.2d 1195 (5th Cir. Ga. 1977).

Paragraph of contract for sale of computer core memories which provided that agreement would be construed under laws of California was valid under UCC § 1-105. Three-Seventy Leasing Corp. v. Ampex Corp., 528 F.2d 993 (5th Cir. Tex. 1976).

In action by corporation headquartered in Pennsylvania, as lessee of Swiss hotel, seeking to enjoin Pennsylvania bank from honoring lessor's draft under letter of credit issued pursuant to lease agreement, Pennsylvania Uniform Commercial Code was applicable law, although each of the three parties had, by agreement, assumed obligations to the others, and each agreement specified different controlling law (i.e. lease agreement provided it would be governed by law of Switzerland, letter of credit agreement specified it would be construed in accordance with Pennsylvania law, and letter of credit itself stated that its engagement was subject to Uniform Customs and Practice for Documentary Credits), since it was clear that law of Switzerland did not apply to question whether bank should be enjoined from honoring draft and since Uniform Customs and Practice for Documentary Credits did not purport to offer rules governing issuance of injunction against honor of draft. Intraworld Indus., Inc. v. Girard Trust Bank, 461 Pa. 343, 336 A.2d 316 (1975).

Member of Navaho Nation residing on Navaho Reservation in New Mexico who purchased pickup truck in New Mexico and finance company that financed purchase were free under UCC § 1-105 to choose whether law of state of New Mexico or that of Navaho Tribe was applicable to transaction. Jim v. CIT Fin. Servs. Corp., 87 N.M. 362, 533 P.2d 751 (1975).

Where contract between two Delaware corporations for design and construction of tanker contained provision that contract should be governed by laws of United States and State of New York, court would recognize this choice of law provision. Falcon Tankers, Inc. v. Litton Sys., 300 A.2d 231 (Del. Super. 1972).

While as between themselves the parties to a security interest transaction may lawfully agree as to the governing law, where the rights of third party creditors in the property of one of the parties are in question, the law of the state of the domicil or place of business of the contracting party in question is controlling. Industrial Packaging Prods. Co. v. Fort Pitt Packaging Int'l, Inc., 399 Pa. 643, 161 A.2d 19 (1960).

8. —Reasonable relation.

Contract between Illinois pipe seller and Missouri buyer, which was qualified

to do business in Mississippi, bore reasonable relation to Mississippi and therefore Mississippi's conflict of law rule for warranty claims applied, requiring application of Mississippi's substantive law to implied warranty claims, notwithstanding any choice of law provision to the contrary; seller entered into contract to be performed in Mississippi, seller shipped its product to Mississippi, and seller sent field technician to aid in installation of pipes in Mississippi. IHP Indus., Inc. v. PermAlert, Esp., 947 F. Supp. 257 (S.D. Miss. 1996).

UCC § 1-105(1) expressly provides that "the parties may agree that the law of either this state or of such other state or nation shall govern their rights and duties." The one requirement, however, is that the law of the state which the parties have chosen must bear a "reasonable relation" to the transaction involved. Doyle v. Northrop Corp., 455 F. Supp. 1318 (D.N.J. 1978).

UCC § 1-105(1) requires a reasonable relation between the transaction and the state whose law is chosen to apply to it. U.S. Manganese Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 576 F.2d 153 (8th Cir. Ark. 1978).

In action by English pipe manufacturer against American corporations for breach of contract for sale and distribution of plaintiff's pipes in United States, applicable law was that of England where contract contained explicit choice-of-law clause specifying that contract would be covered by English law; defendants' purchase in England of plaintiff's pipes provided "reasonable relation" between transaction and England, thus validating clause under UCC § 1-105(1). L. Orlik Ltd. v. Helme Prods. Inc., 427 F. Supp. 771 (S.D.N.Y. 1977).

Reasonable relationship test was met where whiskey distributorship contracts between English exporters and New York importers provided that they were to be governed by English law and where contracts were executed in United Kingdom, exporters were incorporated in United Kingdom, performance by exporters occurred in United Kingdom, and payment was made and title to goods passed in United Kingdom. Fleischmann Distilling Corp. v. Distillers Co., 395 F. Supp. 221 (S.D.N.Y. 1975).

Corporate notes issued by Delaware corporation which stated that they would be governed by and construed in accordance with law of New York, but which bore no reasonable relationship to New York, bore reasonable relationship to Delaware, and its law controlled whether holder was owner of negotiable instrument. Where corporate note stated that it had been made and delivered in California and would be governed by laws of California, issuance of note to holders bore reasonable relationship to California and issue of negotiability of instrument would be determined by California law. Third corporate note which was issued and paid for in New York and which incorporated agreement making note subject to laws of state of New York bore reasonable relationship to New York so as to make its laws determinative of its negotiability. Baker v. Gotz, 387 F. Supp. 1381 (D. Del. 1975), aff'd, 523 F.2d 1050 (3d Cir. Del. 1975).

Choice of law provision in brokerage agreement was valid and Usury Law of New York would be applied, where brokerage arrangements between parties bore "reasonable relationship" to New York, and "significant enough portion" of performance occurred there. Mell v. Goodbody & Co., 10 Ill. App. 3d 809, 295 N.E.2d 97, 63 A.L.R.3d 335 (1st Dist. 1973).

In a diversity action concerning, among other issues, "transactions in goods" within the scope of the U.C.C.'s article on sales, which were purchased by plaintiff, a New York corporation, from defendant, an Ohio corporation, the court, pursuant to the conflict of law rules of New York, the forum state, held that since New York was "appropriately related" to the transaction herein involved and Ohio was "reasonably related" to the "transaction," Ohio law governed insofar as the parties had agreed to let the law of Ohio govern the validity, interpretation and performance of the contract. County Asphalt, Inc. v. Lewis Welding & Eng'g Corp., 444 F.2d 372 (2d Cir. N.Y. 1971), cert. denied, 404 U.S. 939, 92 S. Ct. 272, 30 L. Ed. 2d 252 (1971).

Subsection (1) of this section constitutes legislative recognition of the wisdom of

permitting parties to give added certainty to a contract by expressly stipulating reasonably the governing law. Maxwell Shapiro Woolen Co. v. Amerotron Corp., 339 Mass. 252, 158 N.E.2d 875 (1959).

9. Choice of applicable law in absence of agreement.

Section 75-1-105 authorizes application of Mississippi substantive law on privity, disclaimers and limitations of remedies in warranty action only when transaction giving rise to warranty claim bears some reasonable and appropriate relationship to Mississippi, and in absence of such relation, application of Mississippi substantive warranty law violates constitutional guarantees. Price v. International Tel. & Tel. Corp., 651 F. Supp. 706 (S.D. Miss. 1986).

In debtor's action to enjoin creditor from enforcing two security agreements against collateral therefor, where evidence showed (1) that debtor and creditor had entered into such security agreements and that one of them had been perfected in several states, including New Jersey, (2) that second security agreement had in no way diminished validity of first security agreement, (3) that debtor's reason for seeking injunction against enforcement of such security agreements was creditor's alleged oral agreement to refrain from foreclosing on any debts due it in order to allow debtor to attain a healthy operating condition, (4) that creditor, after concluding that debtor could not attain a healthy operating condition, formally declared debtor to be in default under such security agreements and to owe creditor over $27 million in principal debt, and (5) that creditor had then accelerated maturity of all of debtor's term obligations and demanded payment of all principal and interest on debtor's demand obligations, court held (1) that debtor's claim of alleged oral agreement to refrain from foreclosure was unsupported by the evidence, (2) that under (a) UCC § 1-105(1), dealing with power of parties to choose law applicable to their transactions, (b) UCC § 9-102(1), which intends that substantive law of place where collateral is located governs without regard to possible contracts in other jurisdictions, and (c) UCC § 9-103, which lays down numerous choice-of-law rules regarding creation, perfection, and priorities in multistate security-agreement transactions, law of New Jersey governed security agreements in suit, (3) that security interests created by security agreements in suit were valid, (4) that debtor had failed to show any reason for granting injunctive relief against their enforcement, and (5) that on debtor's default, creditor under UCC § 9-501(1), as adopted in New Jersey, had right to reduce its claim to judgment and to foreclose on the collateral. Doyle v. Northrop Corp., 455 F. Supp. 1318 (D.N.J. 1978).

In action by Rhode Island bank to recover on 2 checks drawn on Massachusetts bank by Massachusetts corporation which had stopped payment, Massachusetts law applied, absent any evidence that parties agreed that a particular state's law would apply. Industrial Nat'l Bank v. Leo's Used Car Exch. Inc., 362 Mass. 797, 291 N.E.2d 603 (1973).

In determining what law governs, traditional contract conflict rules must give way to the requirements of the UCC, as interpreted, though by way of dictum by the Pennsylvania Supreme Court as adopting the "grouping of contacts" rule. Tucker v. Capitol Mach., Inc., 307 F. Supp. 291 (M.D. Pa. 1969).

Where contract for construction of a boat was made in New York, and payment and delivery were to be made in that state, the New York version of the UCC was applicable to the transaction. Silver v. Sloop Silver Cloud, 259 F. Supp. 187 (S.D.N.Y. 1966).

Diversity action based on breach of warranty brought against grenade manufacturer by army enlisted man; enlisted man was Georgia citizen, was injured in Georgia, brought suit in Georgia federal district court against defendants alleged to be doing business in Georgia pursuant to Georgia statute concerning jurisdiction over non-residents; held, Georgia law applies to warranty question according to conflicts rule stated in UCC § 1-105. Whitaker v. Harvell-Kilgore Corp., 418 F.2d 1010, 38 A.L.R.3d 1229 (5th Cir. Ga. 1969), reh'g denied, 424 F.2d 549, 38 A.L.R.3d 1244 (5th Cir. Ga. 1970).

Arkansas law governs the enforcement of a conditional sales contract executed in

that state in connection with the purchase of an automobile there, where the contract provides that the seller's Arkansas office is the only designated place of payment; and the fact that at the time of the contract's execution the vendee was a resident of Tennessee and the contract was assigned to a Tennessee bank is immaterial in the absence of an agreement between the parties that Tennessee law would govern. Lyles v. Union Planters Nat'l Bank, 239 Ark. 738, 393 S.W.2d 867 (1965).

The fact that a buyer went to another state merely to take possession of a truck was only incidental to the transaction involving the vehicle's sale and purchase where both buyer and seller were residents of Wyoming and the truck was brought there by the purchaser, and Wyoming law applied to the transaction between the parties. Park County Implement Co. v. Craig, 397 P.2d 800 (Wyo. 1964).

Where contracts for the sublease of lands and the conditional sale of a roadside diner located in New Hampshire were entered into in Massachusetts by residents of that state, they are to be interpreted and enforced in accordance with Massachusetts law. Conte v. Styli, 26 Mass. App. Dec. 73 (1963).

The application of Pennsylvania law was warranted where Delaware residents purchased a boat in Delaware, agreeing to pay the remainder of the purchase price in monthly instalments, and gave what amounted to a purchase money security interest to a Pennsylvania company, the assignee of an agreement executed by the buyers and sellers, called a Pennsylvania equipment lease, and agreement was not filed anywhere and did not contain a provision as to the application of the law of any specific state, but called for performance in Pennsylvania, and after repossession in Delaware, the boat was brought to Pennsylvania and sold. Atlas Credit Corp. v. Dolbow, 193 Pa. Super. 649, 165 A.2d 704 (1960).

10. —Appropriate relation.

Where no appropriate relation to Mississippi exists in case, center of gravity doctrine applies, and § 75-1-105 requires application of significant contacts analysis, and 1978 amendment to § 75-1-105 did not abrogate this requirement. Price v. International Tel. & Tel. Corp., 651 F. Supp. 706 (S.D. Miss. 1986).

In wrongful death action involving claims based on breach of both express warranties and implied warranty of merchantability attaching to defendant's sale of radial tires to plaintiff and her deceased husband, court held (1) that under UCC § 1-105(1), since significant part of transaction, including sale, service, and use of the tires, had occurred in Florida, plaintiff's cause of action arose in Florida and was guaranteed by Florida Wrongful Death Act, (2) that plaintiffs' theory of recovery was governed by Florida's interpretation of Florida Uniform Commercial Code provisions governing actions for breach of express and implied warranties, and (3) that under Florida law, contributory negligence, assumption of the risk, and misuse were available defenses to action for breach of warranty. Westerman v. Sears, Roebuck & Co., 577 F.2d 873 (5th Cir. Fla. 1978).

In action by employees under third-party-beneficiary-of-warranty provisions in Alabama version of UCC § 2-318 for breach of warranties made in connection with sale of sandblasting hoods and respirators, evidence that such items were sold to Alabama company for resale in Alabama, that items were to be used in Alabama, and that warranties made in connection with items were to be performed in Alabama was sufficient to establish appropriate relationship necessary under UCC § 1-105(1) to apply Alabama law to controversy. Simmons v. American Mut. Liab. Ins. Co., 433 F. Supp. 747 (S.D. Ala. 1976), aff'd sub nom. Love v. American Mut. Liab. Ins. Co., 560 F.2d 1021 (5th Cir. Ala. 1977), aff'd, 560 F.2d 1022 (5th Cir. Ala. 1977).

In diversity action in which damages were sought for destruction of logging machine on theory of breach of implied warranties that machine was safe and proper for intended use and was of good and merchantable quality, where plaintiff was Pennsylvania corporation that purchased machine from Georgia distributor, delivery was made in Georgia, warranty repairs and servicing were performed in

Georgia, and machine was used solely in Georgia by one of plaintiff's corporate divisions until it was destroyed by fire caused by defect in machine, (1) since entire transaction was centered in Georgia and did not bear sufficiently appropriate relation to Pennsylvania within meaning of Pennsylvania UCC § 1-105(1), Georgia law would be applied to case and not law of Pennsylvania; and (2) under Georgia law, in absence of privity, consumer could not recover from manufacturer for breach of implied warranty if consumer had not purchased goods directly from manufacturer. Armstrong Cork Co. v. Drott Mfg. Co., 433 F. Supp. 413 (E.D. Pa. 1977).

Under UCC § 1-105(1) providing that law of forum (i.e., Texas) should govern cause of action based on breach of contract and warranty if disputed transaction bore "appropriate relation to this state," Oklahoma, and not Texas, law would be applied where contracts for sale of railroad tank cars were executed in Oklahoma, cars were manufactured in Ohio, and delivered in Pennsylvania, Ohio and Texas, where at time of performance under contract neither party had its principal place of business in Texas, and where only other link between forum state and transactions was that portion of repairs to tank cars occurred in Texas. Continental Oil Co. v. General Am. Transp. Corp., 409 F. Supp. 288 (S.D. Tex. 1976).

In action by manufacturer to recover termination charges on valves which were either completed or partially completed pursuant to two purchase orders placed by buyer, under UCC § 1-105 transaction bore appropriate relation to forum state where buyer was forum state corporation located within forum. Crane Co. v. Roberts Supply Co., 196 Neb. 67, 241 N.W.2d 516 (1976).

In diversity action by Florida carpet dealer against Pennsylvania manufacturer for damages arising out of manufacturer's alleged breach of express and implied warranties in connection with sale of defective carpet, federal district court correctly applied Florida law; transaction had "appropriate relation" to Florida under UCC § 1-105(1) where, inter alia, manufacturer and dealer both knew that carpet was to be installed in Florida and where alleged injury occurred solely in Florida. Aldon Indus., Inc. v. Don Myers & Assocs., 517 F.2d 188 (5th Cir. Fla. 1975).

Where contract for sale of used automobile was formed in Florida and was to be performed in Ohio, where there was no specific agreement between parties respecting which state's law should govern transaction, but contract of sale noted, "Not tax, out of state," and where, furthermore, automobile and certificate of title were to be delivered in Ohio and automobile was to be driven, serviced and maintained in Ohio, transaction bore "an appropriate relation" to Ohio, and therefore Ohio law was applicable with respect to buyer's action against seller for rescission of contract. Lloyd v. Classic Motor Coaches, Inc., 74 Ohio Op. 2d 493, 388 F. Supp. 785 (N.D. Ohio 1974).

Fact that injury occurred in New Hampshire gives that state appropriate and significant relationship to transaction so that, in absence of express declaration of applicable choice of law, New Hampshire law was applicable. Stephan v. Sears, Roebuck & Co., 110 N.H. 248, 266 A.2d 855 (1970).

Oklahoma Code Comment to UCC § 1-105 indicates that Code provision providing that UCC applies to transactions bearing an "appropriate relation" to Oklahoma is new, and probably changes law in Oklahoma. Williams v. Texas Kenworth Co., 307 F. Supp. 748 (W.D. Okla. 1969).

"Appropriate relation" means same thing as more common phrase "significant contacts"; where dump trucks in question were located in Colorado at time of transaction, where seller's place of business was in Colorado and sales agreement was reached there, and where only payment by mail and later delivery of trucks took place in Oregon, under Oregon decisions, Colorado law must be applied. GECC v. R.A. Heintz Constr. Co., 302 F. Supp. 958 (D. Or. 1969).

The concept of appropriate relationship should be applied even before the effective date of the Code as that rule is more flexible and better adapted to deal with modern problems. Baffin Land Corp. v. Monticello Motor Inn, Inc., 70 Wash. 2d 893, 425 P.2d 623 (1967).

In a case involving the automobile guest statute and a question of conflict of laws the Wisconsin court observed that this section recognizes an "appropriate relations" test for determining applicable law and that the official comments on the UCC refer to a transaction's "significant context" as being factors in the choice of applicable law. Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 408 (1965).

In a case where the issue was as to whether plaintiff had been guilty of a breach of contract in making instalment payments on the purchase of an airplane so as to give the seller a right to repossess the plane, the question as to whether Massachusetts law applied to the transaction was to be determined under subsection (1) of § 1-105 of the instant chapter, and not under subsection (2) of said section and the reference therein to §§ 9-102 and 9-103 applicable to secured transactions because the issues in such case involved the duties of the parties under the primary obligation, and because the validity of perfection of the security interest was not involved. Skinner v. Tober Foreign Motors, Inc., 345 Mass. 429, 187 N.E.2d 669 (1963).

Where a written agreement bore an appropriate relation to Massachusetts so as to be governed by Massachusetts law, under the instant section, an oral modification of such contract would similarly be governed by Massachusetts law in the absence of proof as to where the oral modification was made and in the absence of proof that the oral modification did not bear an appropriate relation to Massachusetts. Skinner v. Tober Foreign Motors, Inc., 345 Mass. 429, 187 N.E.2d 669 (1963).

Where a contract for the purchase of an airplane was executed in Massachusetts between a Connecticut individual and a Massachusetts corporation having a principal place of business in Massachusetts, and the plane was delivered in Massachusetts, the transaction bore an appropriate relation to Massachusetts within the meaning of the instant section, and in the absence of an agreement of the parties that Connecticut law should apply, the law of Massachusetts would govern the transaction. Skinner v. Tober Foreign Motors, Inc., 345 Mass. 429, 187 N.E.2d 669 (1963).

§ 75-1-302. Variation by agreement.

(a) Except as otherwise provided in subsection (b) or elsewhere in the Uniform Commercial Code, the effect of provisions of the Uniform Commercial Code may be varied by agreement.

(b) The obligations of good faith, diligence, reasonableness, and care prescribed by the Uniform Commercial Code may not be disclaimed by agreement. The parties, by agreement, may determine the standards by which the performance of those obligations is to be measured if those standards are not manifestly unreasonable. Whenever the Uniform Commercial Code requires an action to be taken within a reasonable time, a time that is not manifestly unreasonable may be fixed by agreement.

(c) The presence in certain provisions of the Uniform Commercial Code of the phrase "unless otherwise agreed," or words of similar import, does not imply that the effect of other provisions may not be varied by agreement under this section.

SOURCES: Present § 75-1-302 is derived from former § 75-1-102(3) and (4) [Codes, 1942, § 41A:1-102; Laws, 1966, ch. 316, § 1-102, eff March 31, 1968; Repealed by Laws, 2010, ch. 506, § 44, eff from and after July 1, 2010] and was enacted by Laws, 2010, ch. 506, § 3, eff from and after July 1, 2010.

JUDICIAL DECISIONS

I. UNDER CURRENT LAW.

1.-5. [Reserved for future use.]

II. UNDER FORMER § 75-1-102.

6. Effect of agreements.
7. —Particular agreements.

I. UNDER CURRENT LAW.

1.-5. [Reserved for future use.]

II. UNDER FORMER § 75-1-102.

6. Effect of agreements.

Warranties of §§ 75-3-414, 4-207 may be modified or waived by agreement of parties in accordance with §§ 75-1-102, 75-4-103; nothing in Uniform Commercial Code suggests that warranties may be waived or lost by violation of duties imposed under §§ 75-4-202, 75-4-204. White v. Hancock Bank, 477 So. 2d 265 (Miss. 1985).

Portions of Uniform Commercial Code relating to course of dealings or trade usage were not intended to be applied in manner to defeat Code's statute of frauds requirements and, at best, evidence of custom or usage in trade could be used to explain ambiguous portions of an agreement; thus, potato farmer could not introduce evidence of usage or course of dealings within trade to substantiate oral agreement with potato buyer. Dangerfield v. Markel, 222 N.W.2d 373 (N.D. 1974).

Obligations of reasonableness and care may not be disclaimed by agreement, but the parties may agree to the standards to be applied if they are not manifestly unreasonable. Steelman v. Associates Disct. Corp., 121 Ga. App. 649, 175 S.E.2d 62 (1970).

7. —Particular agreements.

Both UCC § 1-102(3) and § 4-103(a) prevented a bank from contracting away its obligation to use ordinary care in the handling of depositors' funds. Bank of S. Md. v. Robertson's Crab House, Inc., 39 Md. App. 707, 389 A.2d 388 (1978).

When a contractor damaged a utilities commission's equipment in the process of testing a control system the contractor installed, the UCC did not apply to the resulting dispute because that dispute involved the service of testing the system. Upchurch Plumbing, Inc. v. Greenwood Utils. Comm'n, — So. 2d —, 2007 Miss. LEXIS 225 (Miss. Apr. 19, 2007), opinion withdrawn by, substituted opinion at 964 So. 2d 1100, 2007 Miss. LEXIS 495 (Miss. 2007).

Bank's conduct in blindly treating commercial paper made payable to its order as bearer paper, for sole reason that both drawer and bearer were known to bank, was manifestly unreasonable, and bank could not establish reasonableness of its conduct on any theory of implied contract in light of UCC § 1-102(3) and § 4-103(a), which prevent banks from contracting away their obligation to use ordinary care in handling depositors' funds. Bank of S. Md. v. Robertson's Crab House, Inc., 39 Md. App. 707, 389 A.2d 388 (1978).

An agreement between an equipment manufacturer and a finance company to the effect that the finance company was under no responsibility to record or file security paper was deemed waived by the finance company's retention of, and inaction upon, a letter from the manufacturer accompanying its transmittal of a conditional sales contract and judgment note requesting the finance company to record the paper, and the finance company's failure to comply with the statute placed the burden of loss from the dissipation of the security upon its shoulders. Congress Fin. Corp. v. Sterling-Coin Op Mach. Corp., 456 F.2d 451 (3d Cir. Pa. 1972).

Provisions of Act may be varied by agreement only when it is not otherwise expressly provided in Act; and any agreement concerning passage of title, whether oral or written, is subject to provision in § 2-401 limiting retention of title by seller in goods delivered to buyer to reservation of security interest. First Nat'l Bank v. Smoker, 153 Ind. App. 71, 286 N.E.2d 203, 287 N.E.2d 788 (3d Dist. 1972).

The UCC recognizes that there may be times when parties to an instrument may choose to alter the general provisions of the UCC to meet their particular purposes. Etelson v. Suburban Trust Co., 263 Md. 376, 283 A.2d 408, 9 U.C.C. Rep. Serv.

1371 (1971) (further holding that individual indorsers on a corporate note who consented to any modification of the terms of the note or the release or exchange of any collateral without notice by the lenders, limited the protection to which they might have otherwise been entitled under the UCC.)

§ 75-1-303. Course of performance, course of dealing, and usage of trade.

(a) A "course of performance" is a sequence of conduct between the parties to a particular transaction that exists if:

(1) The agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and

(2) The other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection.

(b) A "course of dealing" is a sequence of conduct concerning previous transactions between the parties to a particular transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

(c) A "usage of trade" is any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage must be proved as facts. If it is established that such a usage is embodied in a trade code or similar record, the interpretation of the record is a question of law.

(d) A course of performance or course of dealing between the parties or usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware is relevant in ascertaining the meaning of the parties' agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement. A usage of trade applicable in the place in which part of the performance under the agreement is to occur may be so utilized as to that part of the performance.

(e) Except as otherwise provided in subsection (f), the express terms of an agreement and any applicable course of performance, course of dealing, or usage of trade must be construed whenever reasonable as consistent with each other. If such a construction is unreasonable:

(1) Express terms prevail over course of performance, course of dealing, and usage of trade;

(2) Course of performance prevails over course of dealing and usage of trade; and

(3) Course of dealing prevails over usage of trade.

(f) Subject to Section 75-2-209, a course of performance is relevant to show a waiver or modification of any term inconsistent with the course of performance.

(g) Evidence of a relevant usage of trade offered by one (1) party is not admissible unless that party has given the other party notice that the court finds sufficient to prevent unfair surprise to the other party.

SOURCES: Present § 75-1-303 is an integration of former §§ 75-2-208 [Codes, 1942, § 41A:2-208; Laws, 1966, ch. 316, § 2-208, eff March 31, 1968; Repealed by Laws, 2010, ch. 506, § 45, eff from and after July 1, 2010] and 75-2A-207 [Laws, 994, ch. 445, § 1, eff from and after July 1, 1994; Repealed by Laws, 2010, ch. 506, § 46, eff from and after July 1, 2010] into the principles of former § 75-1-205 [Codes, 1942, § 41A:1-205; Laws, 1966, ch. 316, § 1-205, eff March 31, 1968; Repealed by Laws, 2010, ch. 506, § 44, eff from and after July 1, 2010] and was enacted by Laws, 2010, ch. 506, § 3, eff from and after July 1, 2010.

Cross References — Variation by agreement, see § 75-1-102.

Obligation of good faith, see § 75-1-203.

Merchant as one having knowledge of practices involved in transaction, see § 75-2-104.

Statute of frauds, see § 75-2-201.

Course of dealing or usage of trade to explain or supplement agreement, see § 75-2-202.

Formation of sales contract generally, see § 75-2-204.

When course of performance is relevant in determining meaning of agreement, see § 75-2-208.

Unconscionable contract or clause, see § 75-2-302.

JUDICIAL DECISIONS

I. UNDER CURRENT LAW.

1.-5. [Reserved for future use.]

II. UNDER FORMER § 75-1-205.

6. In general.
7. Scope.
8. Course of dealing.
9. —Price.
10. —Variance in quality or quantity.
11. Usage of trade.
12. —Livestock.
13. —Negotiable instruments.
14. —Risk of loss.
15. —Variation in quality or quantity.
16. Modification or waiver; express agreements.
17. —Express agreement; secured transactions.
18. —Implied warranties.
19. —Statute of frauds.
20. Evidence and burden of proof.
21. —Admissibility.
22. —Presumptions.

I. UNDER CURRENT LAW.

1.-5. [Reserved for future use.]

II. UNDER FORMER § 75-1-205.

6. In general.

In action for seller's breach of contract to sell investment securities that buyer had contracted to resell to third person, which breach caused buyer to make "cover" purchase of other securities to effect such resale, court held (1) that although UCC Art 8 contains no provision for buyer's remedies against seller for breach of contract to purchase securities, and although UCC § 2-105(1) expressly excludes investment securities from definition of "goods" for purposes of UCC Art 2, nevertheless, as indicated by Official Comment 1 to UCC § 2-105, buyer's remedies in Art 2 for breach of contract also apply by analogy to investment security transactions; (2) that under UCC § 2-712(2), buyer was entitled to recover as damages difference between cost of cover and contract price of securities in suit, plus incidental and consequential damages; and (3) that benefits that had accrued to buyer as result of its trading of its interest in securities in suit before seller's breach were not relevant to buyer's measure of damages for such breach. G.A. Thompson & Co. v. Wendell J. Miller Mtg. Co., 457 F. Supp. 996 (S.D.N.Y. 1978).

Purpose of UCC § 1-205(1) was to assist court by allowing evidence as to those matters in which basic contract was lacking or as to which basic contract was

ambiguous. Cargill, Inc. v. Kavanaugh, 228 N.W.2d 133 (N.D. 1975).

7. Scope.

Since Uniform Commercial Code does not apply to contract to excavate boot-pit area for rice dryer, provisions of code did not govern admissibility of evidence of custom and usage of trade to explain basis for paying for such excavation work. Venturi, Inc. v. Adkisson, 261 Ark. 855, 552 S.W.2d 643 (1977).

Although the "course of dealing between parties" and "any usage of trade" may be competent to explain ambiguities in a contract, this does not mean that a course of dealing or trade usage may be used to make a contract between parties, and evidence of a seller's dealings with other customers, the discounts granted them, and their names and addresses was not competent in an action in which the purchaser alleged that the seller had agreed to give him a ten percent discount on the price of merchandise purchased. Martin v. Ben P. Eubank Lumber Co., 395 S.W.2d 385 (Ky. 1965).

In Carpenters & Millwrights Local Union v. Riggs-Distler & Co. (1962) 73 NJ Super 253, 179 A2d 564, revd on other grounds 40 NJ 97, 190 A2d 844, the court stated that the wider scope given to customs of trade by Code § 1-205(a) should be followed in a labor hiring controversy although "hiring labor may or may not be regarded as a commercial practice." Carpenters & Millwrights Local Union No. 2018 v. Riggs-Distler & Co., 73 N.J. Super. 253, 179 A.2d 564 (1962), rev'd on other grounds, 40 N.J. 97, 190 A.2d 844 (1963).

8. Course of dealing.

Collecting bank, which held for 52 days after presentment for payment three sight drafts drawn by bank's customer on third-party buyer of goods from bank's customer and such buyer's bank before giving customer notice of drafts' dishonor, acted "seasonably" within meaning of UCC § 4-202(2), since (1) prior course of dealing can establish seasonableness of party's action under UCC §§ 1-205(1) and 3-503; and (2) in present case, bank's collection of payment on three prior drafts of customer had been delayed for 48 days, and in seven other prior transactions, bank had experienced delays of nine to 45 days before obtaining payment of customer's drafts. Southern Cotton Oil Co. v. Merchants Nat'l Bank, 670 F.2d 548 (5th Cir. 1982).

In action for defendant's breach of contract to repurchase cars used in plaintiff's car-rental business, where (1) plaintiff purchased business from independent owner thereof, (2) owner of business, prior to its sale to plaintiff, had agreed with defendant that cars purchased from defendant for use in such business would be repurchased by defendant if they had not been used more than 6,000 miles, and (3) plaintiff's written contract with defendant, covering purchase and repurchase of vehicles used in plaintiff's business and executed after plaintiff had purchased business from prior owner, did not specify number of miles vehicles could be used before repurchase by defendant, but merely provided that after 9,000 miles, "time left in service" of vehicle would "be negotiated," court held (1) that evidence did not show that written contract between plaintiff and defendant had been modified, with respect to defendant's repurchase of vehicles, by prior course of dealing between same parties within meaning of UCC § 1-205(1), but showed that person involved in such prior course of dealing with defendant was seller of business to plaintiff; (2) purchaser of business does not adopt, in absence of evidence to the contrary, seller's prior course of dealing with third parties; and (3) provision in contract between plaintiff and defendant concerning "time left in service" of vehicle did not impose absolute mileage limitation, but was agreement to negotiate "continued use" of vehicle after it had been used for 9,000 miles. Budget Sys. v. Seifert Pontiac, Inc., 80 Colo. App. 406, 579 P.2d 87, 25 U.C.C. Rep. Serv. 630 (1978) (stating that on retrial of case, if evidence should establish a prior course of dealing between plaintiff and defendant that included a mileage limitation, such evidence would be admissible under UCC § 2-202(a) since it would not directly contradict terms of parties' written agreement, but would supplement it).

Where (1) buyer's purchase order to steel supplier provided that shipments of steel were to be made "as directed" by

buyer, (2) buyer did not direct any steel shipments to be made until about one year after contract was entered into, (3) seller, at time of receiving such directions, informed buyer that it could no longer furnish steel at contract price, and (4) seller's officers testified that seller had expected that buyer would start to request deliveries about three months after contract was made, based on seller's performance of prior contracts with buyer, court held (1) that since such prior contracts had concerned smaller construction projects, testimony about them was not a sufficient basis to enable jury to find that parties' prior course of dealing gave to words "as directed" in parties' present contract the meaning-namely, a three-months' delivery time-that seller placed on such words, and (2) that trial court therefore had no reason under UCC § 1-205(1), dealing with effect of prior course of dealing between parties, to submit seller's interpretation of such words to jury. Capital Steel Co. v. Foster & Creighton Co., 264 Ark. 683, 574 S.W.2d 256 (1978).

The term "course of dealing" refers to previous conduct between the parties indicating a common basis for interpreting expressions used by them, and proof of such conduct is limited to objective facts as distinguished from oral statements of agreements. Eskimo Pie Corp. v. Whitelawn Dairies, Inc., 284 F. Supp. 987 (S.D.N.Y. 1968).

Where a used bulldozer was sold under a written contract which made no provision for the assumption by the seller of any part of the cost of future repairs, the fact that the seller subsequently assumed 50 percent of the cost of repairs on two separate occasions was not sufficient to establish a course of dealing between the parties by which the seller was obligated to pay half the cost of any or all of the repairs thereafter made to the machine. Clyde Everett Equip. Co. v. Brockton Perforating Mach. Co., 27 Mass. App. Dec. 66 (1963).

9. —Price.

Testimony by one corporate officer as to his company's practices in pricing resin used for PVC pipes is insufficient to establish pattern or "regularity of observance" and therefore such testimony should not be admitted as evidence of course of dealing or usage of trade. H & W Indus., Inc. v. Occidental Chem. Corp., 911 F.2d 1118 (5th Cir. 1990).

Even in the absence of a written agreement with respect to every term of a contract, great weight attaches to the course of dealing of the parties, and where it appears from the conduct of the parties that their mode of calculating price, although not accepted formally by signature of a written instrument, was adhered to by both parties during an extensive course of dealing, during which the purchaser received, accepted, and paid for over $800,000 worth of merchandise, this course of dealing must be held applicable and governing with respect to remaining merchandise which was received, accepted, but not paid for. Associated Hdwe. Supply Co. v. Big Wheel Distrib. Co., 236 F. Supp. 879 (W.D. Pa. 1965), vacated on other grounds, 355 F.2d 114, 17 A.L.R.3d 998 (3d Cir. Pa. 1965).

10. —Variance in quality or quantity.

Shipping instructions issued by buyer calling for delivery of 10,000 tons of fertilizer during first 25 working days of month, freight prepaid, to places other than buyer's plant, did not constitute anticipatory repudiation of contract under which seller agreed to sell and ship, and buyer agreed to buy and receive at its plant, 10,000 tons of fertilizer within eight-month period of time where (1) quantity requested in shipping instructions did not exceed quantity specified in contract; (2) evidence established that prepayment of freight and shipping to place other than buyer's plant were in accord with course of dealing between parties and, even without course of dealing, there was nothing in language of contract repugnant to place or manner of shipment specified in shipping instructions; (3) seller failed to demonstrate that buyer's demanding entire season's supply in one month was commercially unreasonable and not made in good faith as required by UCC § 2-311(1). Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co., 508 F.2d 283 (7th Cir. Ill. 1974).

In action by buyer alleging that breed of turkeys delivered by seller did not conform to their agreement, evidence estab-

lished that contract, whether oral or written, was reached in context of well established course of dealing and that supplying cross-breed turkeys did not constitute material change from past practice. Amerine Nat'l Corp. v. Denver Feed Co., 493 F.2d 1275 (10th Cir. Colo. 1974).

Description of cotton covered by contracts for sale of future cotton crop, i.e., purchase of cotton grown on specified approximate acreage, was not so vague as to render contracts unenforceable under Code where it appeared, by contracts in question, that each seller intended to sell his entire cotton crop for the year to buyer. R.N. Kelly Cotton Merchant, Inc. v. York, 379 F. Supp. 1075 (M.D. Ga. 1973), aff'd, 494 F.2d 41 (5th Cir. Ga. 1974).

Where writings of parties to contract for sale of sand failed to supply any definition of term "truck measure," but buyer accepted and paid for large quantity of sand at price which had been computed in accordance with seller's understanding of disputed phrase, buyer's course of performance could be viewed as complete acquiescence in seller's interpretation of phrase "truck measure." Blue Rock Indus. v. Raymond Int'l, Inc., 325 A.2d 66 (Me. 1974).

11. Usage of trade.

Regardless of what usage of trade might be under UCC § 1-205(2), secured party could not enforce collection of unaccrued finance charges on debtor's obligation after maturity date of such obligation had been accelerated by creditor under acceleration clause following debtor's default. Credit Alliance Corp. v. Adams Constr. Corp., 570 S.W.2d 283 (Ky. 1978).

Under UCC § 1-205(2), a custom or usage, to become binding on the parties, must have antiquity as well as uniformity and universality and must have continued for such a length of time that the parties must have contracted with respect to it. Riemer Bros. v. Marlis Constr. Co., 64 Ill. App. 3d 80, 380 N.E.2d 1160 (2d Dist. 1978).

In accordance with usage of trade, foundry was not required to deliver patterns to customer before receiving payment therefor. Cooper Alloy Corp. v. E.B.V. Sys., 111 R.I. 756, 306 A.2d 837 (1973).

The term "usage of trade" refers to evidence of generalized industry practice or similar recognized custom, as distinguished from particular conversations or correspondence between the parties with respect to the terms of the agreement. Eskimo Pie Corp. v. Whitelawn Dairies, Inc., 284 F. Supp. 987 (S.D.N.Y. 1968).

Where default occurred in payment of an automobile retail instalment contract in August of 1965 but the security holder did not make demand upon the dealer for performance of its repurchase agreement until October of 1966, and it was the custom and usage that the lending institution is required to repossess and return the vehicle for repurchase within a reasonable time after default and that 90 days is regarded as a reasonable time, the security holder could not enforce the repurchase agreement which contained no provision inconsistent with the custom and usage. Valley Nat'l Bank v. Babylon Chrysler-Plymouth, Inc., 53 Misc. 2d 1029 (1967), aff'd, 28 A.D.2d 1092, 284 N.Y.S.2d 849 (2d Dep't 1967).

12. —Livestock.

In action arising out of auction sale of mare described in sales catalog as "barren," but which subsequently "slipped" a dead foal, buyer who effectively revoked sale had right under UCC §§ 2-601 and 2-608 to reject mare after acceptance and burden under UCC § 2-607 upon buyer to show breach did not apply. Since acceptance was revoked, burden was on seller to show mare's conformity with catalog description but seller did not meet that burden where he failed to prove that mare was either barren or that, pursuant to usage of trade under UCC § 1-205, mare pronounced in foal and later found empty without evidence of abortion could be described as barren. Keck v. Wacker, 413 F. Supp. 1377 (E.D. Ky. 1976).

In action arising out of sale of bull, seller's answer; which alleged, inter alia, that by custom of trade in breeding animals there was no implied warranty of fitness for particular purpose in sale of bull, was sufficient under UCC § 1-205(6) to put buyers on notice of defense of exclusion under UCC § 2-316 of implied warranty of fitness under UCC § 2-315. Torstenson v. Melcher, 195 Neb. 764, 241 N.W.2d 103 (1976).

13. —Negotiable instruments.

14. —Risk of loss.

In action for damages for sale of negligently manufactured film, (1) evidence was sufficient to support jury finding that at time of sale of film to plaintiff, trade usage existed, within meaning of UCC § 1-205(2), which limited commercial buyer's remedy to replacement of negligently manufactured film; (2) evidence also was sufficient to support finding that replacement of negligently manufactured film constituted plaintiff's sole remedy under UCC § 2-719(1)(b); (3) such limited remedy did not fail of its essential purpose under UCC § 2-719(2); and (4) such limited remedy also did not operate in unconscionable manner within meaning of UCC § 2-719(3) because it was reasonably adapted to general commercial background and needs of film industry. Posttape Assocs. v. Eastman Kodak Co., 450 F. Supp. 407 (E.D. Pa. 1978).

In action by diamond wholesaler against retailer to recover price of goods shipped under "all-risk" memorandum, custom and usage of industry established liability of consignee for full memorandum price of merchandise stolen while in his possession. Lipschutz v. Gordon Jewelry Corp., 373 F. Supp. 375 (S.D. Tex. 1974).

15. —Variation in quality or quantity.

In action by purchaser of air conditioners to recover damages from manufacturer for repudiation of contract to supply airconditioners, where manufacturer had submitted bid to supply airconditioners in accord with buyer's specifications, where, although specifications provided that " [c]apacities shall not be less than indicated," airconditioners had approximate six per cent deficiency in capacity to remove heat, and where manufacturer refused to supply airconditioners in literal compliance with bid, trial court erred (1) in excluding evidence as to customs and usage in air conditioning industry to effect that reasonable variations in cooling capacity are considered to comply with specifications, and (b) in refusing to permit jury to consider such customs and usage if they would vary terms of written agreement. Modine Mfg. Co. v. North E. Indep. Sch. Dist., 503 S.W.2d 833 (Tex. Civ. App. 1973), ref. n.r.e (Apr. 17, 1974).

16. Modification or waiver; express agreements.

UCC § 9-306(2) codifies the common-law waiver. However, although prior course of dealing, without more, is not sufficient to waive written agreement to the contrary in light of UCC § 1-205(4), any course of performance or other conduct subsequently to the agreement can amount to a waiver. Southwest Wash. Prod. Credit Ass'n v. Seattle-First Nat'l Bank, 19 Wash. App. 397, 577 P.2d 589 (1978), overruled on other grounds, 92 Wash. 2d 30, 593 P.2d 167 (1979).

In action for breach of contract to construct mechanical loading platforms for use in distribution center building, letter sent to defendant after it became clear that defendant would not perform which cancelled contract "without charge" could not as matter of law amount to waiver or renunciation of claim arising out of breach under UCC §§ 1-107 and 2-720; under UCC § 1-205, meaning to be given phrase "without charge" would require consideration of any course of dealing between parties and any applicable trade usage. NCR v. UNARCO Indus., Inc., 490 F.2d 285 (7th Cir. Ill. 1974).

Express terms of agreement should be construed where reasonable as consistent with custom of trade or course of dealing evidenced by previous conduct of parties. Gindy Mfg. Corp. v. Cardinale Trucking Corp., 111 N.J. Super. 383, 268 A.2d 345 (1970).

When custom and usage are inconsistent with the express terms of an agreement, the agreement terms control. Valley Nat'l Bank v. Babylon Chrysler-Plymouth, Inc., 53 Misc. 2d 1029 (1967), aff'd, 28 A.D.2d 1092, 284 N.Y.S.2d 849 (2d Dep't 1967).

17. —Express agreement; secured transactions.

In suit by lender against auctioneer for conversion of cattle constituting lender's collateral by sales in which proceeds were remitted only to debtor, (1) provisions in security agreement specifically authorizing debtor to sell cattle and other collateral with lender's prior written consent, or

with payment made jointly to debtor and lender, did not violate UCC § 1-205(4) or § 9-306(2), and did not constitute either express waiver of lender's security interest in cattle or express consent to sales complained of; (2) lender under UCC § 1-205(4) did not impliedly consent to such cattle sales, and thus impliedly waive its security interest, by its course of conduct in allowing debtor to sell other collateral in debtor's name, receive payment therefor, and remit proceeds to lender without admonishing debtor for his violation of security agreement's provisions; (3) lender's statement to debtor, however, that he could sell cattle "providing he applied the proceeds from that sale" constituted express consent to sell cattle in manner not designated in parties' security agreement; and (4) defendant auctioneer, as debtor's agent, acquired same right to sell that debtor possessed, thus rendering auctioneer not liable for conversion. North Cent. Kan. Prod. Credit Ass'n v. Washington Sales Co., 223 Kan. 689, 577 P.2d 35 (1978).

Where bank had perfected security interest in cattle under agreement which prohibited sale of collateral without bank's prior written approval and where farmer sold cattle without such approval, security interest survived sale pursuant to UCC § 9-306(2) and buyers were liable for conversion, even though in prior transactions with debtor bank had not objected to such sales of collateral, as UCC § 1-205(4) provides that course of dealings may be used to interpret terms of agreement but not to contradict them. Wabasso State Bank v. Caldwell Packing Co., 308 Minn. 349, 251 N.W.2d 321 (1976).

Although security agreement covering livestock expressly prohibited debtor from selling collateral without written consent of secured party, debtor had implied authority to sell collateral free from security interest under UCC § 9-306(2) where, from beginning of secured party's relationship with debtor, sales of livestock pledged as collateral were made to various livestock dealers, and where secured party had knowledge of this, raised no objection, accepted checks from these sales for credit to debtor's account, and clearly relied on debtor's honesty to properly account for proceeds; this established course of dealing which constituted authority to sell livestock free from security interest, notwithstanding claim that, under UCC § 1-205(4), express terms of security agreement prohibiting sale controlled. Hedrick Sav. Bank v. Myers, 229 N.W.2d 252 (Iowa 1975).

An agreement between an equipment manufacturer and a finance company to the effect that the finance company was under no responsibility to record or file security paper was deemed waived by the finance company's retention of, and inaction upon, a letter from the manufacturer accompanying its transmittal of a conditional sales contract and judgment note requesting the finance company to record the paper, and the finance company's failure to comply with the statute placed the burden of loss from the dissipation of the security upon its shoulders. Congress Fin. Corp. v. Sterling-Coin Op Mach. Corp., 456 F.2d 451 (3d Cir. Pa. 1972).

Security agreement provision that debtor would not sell or otherwise dispose of collateral without prior written consent of secured party controlled course of dealing of parties and usage of trade in determining whether sale of collateral was impliedly authorized by inclusion of proceeds as collateral. United States v. E.W. Savage & Son, 343 F. Supp. 123 (D.S.D. 1972), aff'd, 475 F.2d 305 (8th Cir. S.D. 1973).

Course of dealing or trade usage, within meaning of Code, is used as factor to determine commercial meaning of agreement which parties made, and, under facts established by pleadings, would not cause lender and holder of security agreement on corn to waive or be estopped to assert its security interest in corn purchased by grain elevator operator from borrower. Vermilion County Prod. Credit Ass'n v. Izzard, 111 Ill. App. 2d 190, 249 N.E.2d 352 (4th Dist. 1969).

Written agreements between a finance company and an automobile dealer could be explained or supplemented by a course of dealing or usage or by a course of performance. Skeels v. Universal C.I.T. Credit Corp., 222 F. Supp. 696 (W.D. Pa. 1963), vacated on other grounds, 335 F.2d 846 (3d Cir. Pa. 1964).

Where, according to the usage of the trade, "cotton waste" and "cotton linters"

are entirely different articles, a financing statement which describes cotton waste cannot be interpreted to impose a security interest on cotton linters. Annawan Mills, Inc. v. Northeastern Fibers Co., 26 Mass. App. Dec. 115, 4 U.C.C. Rep. Serv. 787 (1963).

18. —Implied warranties.

An implied warranty may be excluded or modified by a course of dealing (Uniform Commercial Code, § 2-316, subd [3], par [c]; § 1-205, subd [1]); however, there is no exclusion where proof of such a course of dealing between plaintiff and third-party defendant is inconclusive and where the third-party defendant asserting the exclusion had notice and aided in the completion of a written agreement which contained an assignment of plaintiff's rights for breach of warranty against the third-party defendant. United States Leasing Corp. v. Comerald Assocs., 101 Misc. 2d 773 (1979).

Discussions between president of corporate purchaser and seller of golf carts re warranties and filing of claim thereunder constituted course of dealing under UCC § 1-205(1) and thus could be basis for limitation of implied warranties. Country Clubs, Inc. v. Allis-Chalmers Mfg. Co., 430 F.2d 1394 (6th Cir. Tenn. 1970).

Where buyer asserted unawareness of usage of trade as to exclusion of implied warranty of merchantability as to seeds, there was question of fact as to exclusion of warranty, precluding summary judgment for seller, even though written warranty exclusion was ineffective. Zicari v. Joseph Harris Co., 33 A.D.2d 17 (4th Dep't 1969), appeal denied, 26 N.Y.2d 610 (1970).

19. —Statute of frauds.

In action by buyer against seller arising out of nondelivery of wheat under oral sales contract, original oral contract was not rendered unenforceable by UCC § 2-201 statute of frauds, where seller admitted existence of contract. Nor was oral modification of contract as to delivery date due to unavailability of elevator space rendered unenforceable by statute of frauds requirement under UCC §§ 2-209 and 2-201 where pursuant to UCC § 1-103 and 2-209, seller waived statute of frauds defense through his course of performance under UCC § 2-208 and 1-205 in delivering 36 truckloads of wheat well after original delivery date without making timely objection. Farmers Elevator Co. v. Anderson, 170 Mont. 175, 552 P.2d 63 (1976).

Portions of Uniform Commercial Code relating to course of dealings or trade usage were not intended to be applied in manner to defeat Code's statute of frauds requirements and, at least, evidence of custom or usage in trade could be used to explain ambiguous portions of an agreement; thus, potato farmer could not introduce evidence of usage or course of dealings within trade to substantiate oral agreement with potato buyer. Dangerfield v. Markel, 222 N.W.2d 373 (N.D. 1974).

20. Evidence and burden of proof.

Evidence of "course of dealing" can have no probative value where parties have previously entered into written agreement setting forth their respective rights and duties, but where that agreement is not produced at time of trial nor any evidence of its terms. Family Provisioners, Inc. v. Columbia Acceptance Co., 274 Or. 303, 545 P.2d 1379 (1976).

Where trade usage must be resorted to for interpretation of contract, such trade usage would have to be demonstrated by something more than oral argument. Cable-Wiedemer, Inc. v. A. Friederich & Sons Co., 71 Misc. 2d 443 (1972).

Notwithstanding that there was uncontradicted testimony that it was custom and usage of trade that second-hand or used airplanes were sold without warranty, where seller of aircraft failed to show scope of this custom, whether local or universal, seller failed to carry burden cast upon it on its motion for summary judgment in buyer's action on alleged implied warranty as to merchantability. Georgia Timberlands, Inc. v. Southern Airways Co., 125 Ga. App. 404, 188 S.E.2d 108 (1972).

21. —Admissibility.

In action on open account, trial court erred in excluding evidence of prior dealings between parties because such dealings, under UCC § 1-205(1), would have been probative as to whether defendant

had maintained account during particular year alleged by plaintiff and for which suit was brought. Deroller v. Powell, 144 Ga. App. 585, 241 S.E.2d 469 (1978).

In action to determine priority of security interests of bank and seller of hardware store, where evidence showed that seller's security interest in purchaser's collateral was perfected by filing on July 20, 1972, and that bank's interest in same collateral was perfected by filing on November 2, 1972; that bank, by subordination agreement entered into on July 12, 1972, had subordinated its claim against purchaser to claim of seller; and that on December 11, 1973, rider to subordination agreement supplementary principles of law and equity, non-UCC parol evidence rule applied to case; (3) under UCC § 1-205(4), non-UCC parol evidence rule barred parol evidence by bank that rider was intended to grant bank priority as to claims in excess of first $15,000 of purchaser's indebtedness to seller, since such evidence was totally inconsistent with unambiguous terms of rider which were controlling; and (4) even if seller's security interest should fail to meet test for special priority under UCC § 9-312(3), executed by bank, seller, and purchaser provided that agreement should apply only to first $15,000 of purchaser's indebtedness to seller and that priority of claims concerning remainder of such indebtedness should be determined in accordance with UCC Article 9, (1) provisions of UCC Article 1 applied to case, since subordination agreement and rider related to transactions covered by Uniform Commercial Code and rider specifically referred to Article 9; (2) under UCC § 1-103, dealing with application of seller's interest would still prevail under first-to-file rule of UCC § 9-312(5). Peoples Bank & Trust v. Reiff, 256 N.W.2d 336 (N.D. 1977).

In action by wholesaler against retailer for recovery of purchase price of two motorcycles, under UCC §§ 1-205, 2-202 and 2-326(4) trial court properly denied admissibility to defendant's proposed parol evidence that agreement was actually consignment sale agreement under "sale or return" arrangement, where written sales agreement between parties was not ambiguous. Recreatives, Inc. v. Travel-On Motorcycles Co., 29 N.C. App. 727, 225 S.E.2d 637 (1976).

In action on contract to deliver 4,000 bushels of soybeans by buyer against farmer who as result of drought was able to deliver less than 2,000 bushels, his entire crop, rejection of buyer's evidence relating to custom and usage of soybean trade was proper under UCC § 1-205(6) where offer of evidence came late in trial and probably would have denied seller opportunity to rebut it absent continuance or other disruption of trial. Paymaster Oil Mill Co. v. Mitchell, 319 So. 2d 652 (Miss. 1975).

In action by car dealer against buyer to recover alleged unpaid balance due on sale of car, dealer was not entitled to offer parole testimony under UCC § 2-202(a) that buyer had agreed to deliver insurance check covering wrecked trade-in vehicle as part of consideration where insurance check was not mentioned in contract and contract was, by its own terms, complete and exclusive statement of terms of agreement; nor did evidence disclose course of dealing and usage of trade as defined by UCC § 2-205 or course of performance as defined by UCC § 2-208 which would permit introduction of such evidence. Noble v. Logan-Dees Chevrolet-Buick, Inc., 293 So. 2d 14 (Miss. 1974).

Portions of Uniform Commercial Code relating to course of dealings or trade usage were not intended to be applied in manner to defeat Code's statute of frauds requirements and, at best, evidence of custom or usage in trade could be used to explain ambiguous portions of an agreement; thus, potato farmer could not introduce evidence of usage or course of dealings within trade to substantiate oral agreement with potato buyer. Dangerfield v. Markel, 222 N.W.2d 373 (N.D. 1974).

When UCC § 2-202 expressly allowing evidence of course of dealing or usage of trade to explain or supplement terms intended by the parties as a final expression of their agreement, is read in light of UCC § 1-205(4), it is clear that the test of admissibility is not whether the contract appears on its face to be complete in every detail, but whether the proffered evidence of course of dealing and trade usage reasonably can be construed as consistent

with the express terms of the agreement. Columbia Nitrogen Corp. v. Royster Co., 451 F.2d 3 (4th Cir. Va. 1971).

Evidence of course of dealing and usage of trade is admissible under UCC § 1-205 to amplify, supplement or qualify terms of an agreement, but it does not create an agreement where none previously existed. White Lumber Sales, Inc. v. C. Brinson Lamb & Sons Lumber Co., 121 Ga. App. 702, 175 S.E.2d 81 (1970).

Taken along with other relevant sections of the Uniform Commercial Code, the provision that an agreement may be supplemented by course of dealing or usage of trade tends to allow the use of parol testimony in a proper case. Holland Furnace Co. v. Heidrich, 7 Pa. D. & C.2d 204 (1955).

22. —Presumptions.

Trade usages sanctioned by passage of time are presumed to be within knowledge of parties regularly engaged in business, in present case shipment and carriage of goods by sea, and all contracts are presumed made with reference to trade usages and practice. Du Pont de Nemours Int'l S.A. v. S.S. MORMACVEGA, 367 F. Supp. 793 (S.D.N.Y. 1972), aff'd, 493 F.2d 97 (2d Cir. N.Y. 1974).

§ 75-1-304. Obligation of good faith.

Every contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement.

SOURCES: Present § 75-1-304 is derived from former § 75-1-203 [Codes, 1942, 41A:1-203; Laws, 1966, ch. 316, § 1-203, eff March 31, 1968; Repealed by Laws, 2010, ch. 506, § 44, eff from and after July 1, 2010] and was enacted by Laws, 2010, ch. 506, § 3, eff from and after July 1, 2010.

Cross References — Course of dealing and usage of trade, see §§ 75-1-205, 75-1-303.

Good faith acceleration of payment, see §§ 75-1-208, 75-1-309.

Cure by seller of improper tender or delivery, see § 75-2-508.

Good faith of buyer in selling after rejection of goods, see § 75-2-603.

Substituted performance, see § 75-2-614.

Delay or nondelivery caused by compliance in good faith with governmental regulation or order, see § 75-2-615.

JUDICIAL DECISIONS

I. UNDER CURRENT LAW.

1. -10. [Reserved for future use.]

II. UNDER FORMER § 75-1-203.

11. In general.
12. Applicability to particular parties.
13. Commercial paper.
14. Letters of credit.
15. Sales.
16. Secured transactions.
17. Other commercial transactions.

I. UNDER CURRENT LAW.

1. -10. [Reserved for future use.]

II. UNDER FORMER § 75-1-203.

11. In general.

Section 75-1-203, which provides that every contract imposes an obligation of good faith in its performance or enforcement, does not apply to employment contracts. Hartle v. Packard Elec., 626 So. 2d 106 (Miss. 1993).

The requirement of good faith of the Code is an overriding provision that applies to the termination provision. Tele-Controls, Inc. v. Ford Indus., Inc., 388 F.2d 48 (7th Cir. Ill. 1967).

The provisions of this section superimpose a general requirement of fundamental integrity on commercial transactions regulated by the Uniform Commercial Code. Skeels v. Universal C.I.T. Credit Corp., 335 F.2d 846 (3d Cir. Pa. 1964).

12. Applicability to particular parties.

Issues of material fact remained regarding whether defendants' allegedly fraudulent actions during settlement negotiations arising out of an asbestos lawsuit amounted to a breach of good faith and fair dealing under contract law and Miss. Code Ann. § 75-1-203. Ill. Cent. R.R. Co. v. Harried, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 121309 (S.D. Miss. Dec. 28, 2009).

In a reseller's suit against a communications company, in which a claim for breach of the implied duty of good faith and fair dealing was asserted, a contractual damages limitation was subject to and enforceable under Georgia law, in accordance with the contract's choice of law provision for contract claims, and was not subject to Mississippi law because such a claim was a contract claim under Miss. Code Ann. § 75-1-203. Unity Communs., Inc. v. AT&T Mobility, LLC, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 61349 (S.D. Miss. July 17, 2009), affirmed by 400 Fed. Appx. 944, 2010 U.S. App. LEXIS 23167 (5th Cir. Miss. 2010).

Where plaintiff former employer sued defendant former employee for breach of the implied duty of good faith and fair dealing, the claim was not likely to succeed on the merits for purposes of a preliminary injunction because there was no employment contract and although the employer cited Miss. Code Ann. § 75-1-203, under Miss. Code Ann. § 75-1-102, that only applied to the sale of goods. Block Corp. v. Nunez, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 34374 (N.D. Miss. Apr. 25, 2008).

Words "or duty" were added to section to make it clear that third parties as well as parties to a contract have an obligation of good faith. In re Davidoff, 351 F. Supp. 440 (S.D.N.Y. 1972).

13. Commercial paper.

In action pursuant to UCC § 3-419 by co-payee of check for conversion of check by bank which cashed check with co-payee's endorsement forged by other payee, co-payee, which was not a "customer" of bank within meaning of UCC §§ 4-104 and 4-406, was not equitably estopped by policy of commercial reasonableness under UCC §§ 1-102 and 1-203, notwithstanding that co-payee waited 10 months after it learned of forgery to inform bank, where (1) check, which was issued to co-payee "and" other payee, was properly payable under UCC § 3-116 only if it contained endorsement of both payees; (2) unauthorized endorsement was, in absence of ratification under UCC § 3-404, no endorsement under UCC §§ 3-202 and 3-404; (3) co-payee did not ratify unauthorized endorsement; and (4) bank's failure to ascertain whether co-payee's signature was authorized was not in accord with reasonable commercial standards of banking business under UCC § 3-419. Atlas Bldg. Supply Co. v. First Indep. Bank, 15 Wash. App. 367, 550 P.2d 26 (1976).

Provision in loan agreement providing that borrower would not incur other indebtedness for borrowed money without consent of lender was not unconscionable under UCC § 2-302, since this § 2-302 is applicable only to sales transactions. Nor was clause a breach of obligation of good faith imposed by UCC § 1-203 where loan agreement was negotiated at arm's length between sophisticated commercial parties. Interstate Sec. Police, Inc. v. Citizens & S. Emory Bank, 237 Ga. 37, 226 S.E.2d 583 (1976).

14. Letters of credit.

Issuer bank which refused to pay beneficiary under letter of credit because letter required delivery of goods to place other than place to which beneficiary had shipped goods, and which thereby extricated itself from precarious financial position because customer for whom letter was issued appeared incapable of reimbursing issuer, (1) was not required by good-faith obligation imposed by UCC § 1-203 to amend letter at instance of

beneficiary and issuer's customer, so as to permit delivery at place to which goods were actually shipped, and (2) also was not required to amend letter by UCC § 1-205(2), dealing with issuer's obligation to act in accordance with banking custom and usage, since issuer, in issuing letters of credit, relied on written trade code entitled "Uniform Customs and Practice for Documentary Credits (UCP)" to establish banking practice, and UCP expressly declared that irrevocable letter of credit could not be amended or cancelled without agreement of all parties thereto, namely, beneficiary, customer, and issuer itself. AMF Head Sports Wear, Inc. v. Ray Scott's All-American Sports Club, Inc., 448 F. Supp. 222, 23 U.C.C. Rep. Serv. 990 (D. Ariz. 1978) (construing Arizona law; holding issuer not liable for refusing payment to beneficiary).

15. Sales.

In action by seller of upholstery fabrics against buyer for balance due on unpaid invoices, in which buyer admitted ordering fabrics but alleged that seller had overshipped fabrics to buyer, that buyer had revoked acceptance of overshipped goods and returned them to seller, that seller had allowed credit for returned goods, and that buyer had then paid balance of its account, court held (1) that no overshipments had occurred; (2) that seller had agreed that buyer could return fabrics that buyer could not dispose of at reduced price; (3) that seller never notified buyer that credit memorandum for major part of returned fabrics had been erroneously sent to buyer; (4) that since disputed shipments had conformed to oral orders placed by buyer, buyer's revocation of its prior acceptance of goods under UCC § 2-608(1) was wrongful; (5) that seller was thereafter entitled to remedies provided by UCC § 2-703; (6) that seller's postbreach conduct-which consisted of allowing discount on disputed fabrics, accepting great number of pieces returned to seller, and sending buyer memorandum allowing credit for returned fabrics with no qualification as to memorandum's meaning-showed acquiescence in alleged agreement for return of goods and allowance of discount thereon; and (7) that seller, by failing to exercise diligence in enforcing its rights under the contract, had not exercised good faith required by UCC § 1-203, had seriously misled buyer, and thus was estopped to assert its abandoned rights. Castle Fabrics, Inc. v. Fortune Furn. Mfrs., Inc., 459 F. Supp. 409 (N.D. Miss. 1978).

In buyer's action for seller's breach of written and oral warranties in sale of marine diesel engine, (1) where terms of sale contract were contained in seller's letter to buyer, buyer's written purchase order, and manufacturer's written warranty which accompanied sale of engine; (2) where seller also orally warranted to buyer that engine would deliver specified standard of performance, that if it did not do so it could be removed from buyer's boat at seller's expense, and that it would be delivered in time to meet requirements of builder of buyer's boat; (3) where such oral warranties were breached and buyer, within six-months period provided in written engine warranty for manufacturer's repair or replacement of defective parts, refused to allow manufacturer's mechanic to inspect defective engine; (4) where buyer, more than six months after date engine was put into operation, notified seller that he had removed engine from his boat, tendered engine back to seller, and demanded return of purchase price; and (5) where such tender and demand were refused by seller, (1) trial court properly found that all terms of sale contract had not been reduced to writing; (2) admission in evidence of oral warranties as part of sale contract did not violate parol evidence rule contained in UCC § 2-202; (3) such oral warranties did not constitute "sale or return" provision in contract under UCC § 2-326(1)(b), but were analogous to "sale on approval" provision under UCC § 2-326(1)(a) and thus were not required by UCC § 2-326(4) to be in writing; (4) buyer's failure to allow seller to exercise right under UCC § 2-508(1) to inspect and repair engine negated warranty provisions of sale contract; (5) buyer accepted engine under UCC § 2-327(1)(b) by not seasonably notifying seller of buyer's election to return engine; and (6) buyer's delay of nearly six months in informing seller of buyer's intention to revoke acceptance of engine was insufficient compli-

ance with buyer's good faith obligation under UCC § 1-203 and did not revoke such acceptance under UCC § 2-608. Peter Pan Seafoods, Inc. v. Olympic Foundry Co., 17 Wash. App. 761, 565 P.2d 819 (1977), review denied, 90 Wash. 2d 1015 (1978).

Where contract for sale of popcorn provided that buyer was to pay for shipments of popcorn when delivered and seller repudiated contract after delivering two shipments to buyer's processing plant (for which shipments seller did not demand on-the-spot payment and buyer did not offer to pay at such place, since it customarily paid its obligations from its business office in another city), seller breached his obligation of good faith under UCC § 1-203 in performance of contract, as "good faith" is defined by UCC § 1-201(19), by failing to demand payment after delivery of each shipment and by hastily reselling undelivered part of popcorn crop to another buyer at nearly twice the contract price; trial court, in finding absence of good faith by seller, did not err in employing unconscionability concept of UCC § 2-302 in interpreting contract, since court's statement as to unconscionability was only dictum. Baker v. Ratzlaff, 1 Kan. App. 2d 285, 564 P.2d 153 (1977).

Wholesale parts distributor was not entitled to recover damages from manufacturer resulting from termination of distributorship contract where contract provided that either party could terminate at any time on written notice of 90 days, where, although distributor was required to carry "adequate" inventory of manufacturer's parts, contract also gave manufacturer option to refuse to repurchase inventory upon termination, and where manufacturer terminated contract and refused to repurchase distributor's inventory. Distributor failed to show that repurchase provision was unconscionable within meaning of UCC § 2-302 at time of formation of contract: there was no showing that manufacturer's reasons for reserving repurchase option in its distributorship agreements were not reasonably related to business risks involved; it was not unreasonable per se for manufacturer to reserve right to refuse to repurchase at least portions of distributor's inventory upon termination; and, although manufacturer may have had superior bargaining power, under Code, bona fide allocation of risks would not be disturbed merely because one party had superior bargaining position, particularly where both parties were sophisticated business people. Furthermore, repurchase provision was not unduly one-sided or oppressive; although provision appeared to be unqualified, on its face, any exercise of repurchase election by manufacturer was restricted by manufacturer's obligation to act in good faith pursuant to UCC § 1-203, and, although proof that manner in which repurchase election was exercised at time of termination amounted to breach of manufacturer's implied obligation of good faith and fair dealing would have been independent basis for recovery of damages, neither distributor's complaint nor theory under which case was tried supported findings for distributor based on breach of implied covenant of good faith and fair dealing. W.L. May Co. v. Philco-Ford Corp., 273 Or. 701, 543 P.2d 283 (1975).

Fact that party in default on contract for sale of wheat did not specifically disavow intention to perform obligation in default did not constitute breach of obligation of good faith imposed upon contracting parties under UCC § 1-203. Purpose of UCC § 1-205(1) was to assist court by allowing evidence as to those matters in which basic contract was lacking or as to which basic contract was ambiguous. Cargill, Inc. v. Kavanaugh, 228 N.W.2d 133 (N.D. 1975).

"Outputs" contract under which bakery agreed to sell all breadcrumbs produced by it to promisee did not carry with it implication that bakery was obligated to manufacture breadcrumbs for full term of contract; rather, good faith termination of production of breadcrumbs was permissible under contract. Thus, summary judgment could not be entered in favor of either party to suit for breach of contract where unresolved issues of fact remained as to whether bakery acted in good faith in ceasing production of crumbs because of alleged economic unfeasibility. Feld v. Henry S. Levy & Sons, 37 N.Y.2d 466, 335 N.E.2d 320 (1975).

16. Secured transactions.

In suit by debtor's receiver challenging bank's priority as perfected security interest holder and its concomitant right to take possession and dispose of secured collateral, UCC § 9-402 did not require bank to give notice to debtor's creditors that original security agreement was amended to increase amount of its loan and terms of repayment where increased loan was secured by same collateral originally described in financing statement. Heights v. Citizens Nat'l Bank, 463 Pa. 48, 342 A.2d 738 (1975).

Secured party was not entitled to recover alleged deficiency due after sale of repossessed automobile since (1) three days' notice of resale was not commercially reasonable under UCC § 9-504(3); (2) sale of automobile for only $50 was not in good faith, under UCC § 1-203, or in commercially reasonable manner under UCC § 9-504(3), although automobile was inoperable, where casual inspection would have revealed that automobile was missing spark plugs, points and air cleaner, and installation of these items would have made car operative and would only have required small expenditure; and (3) presumption that collateral was worth at least amount of debt, which arose as result of secured creditor's failure to give sufficient notice of resale, was not overcome by creditor's evidence. Franklin State Bank v. Parker, 136 N.J. Super. 476, 346 A.2d 632 (1975).

Although principles of estoppel and good faith underlie entire UCC, including provisions of Article 9, and lack of good faith on part of secured creditor may alter priorities which would otherwise be determined by Article 9 provisions, mere fact that secured party stood to gain from debtors' wrongful conduct did not in and of itself show lack of good faith and fact that secured party authorized debtors to purchase grain on credit from third party did not constitute evidence of fraudulent scheme or conspiracy. Central Soya Co. v. Bundrick, 137 Ga. App. 63, 222 S.E.2d 852 (1975).

Code requirement of "good faith" prevented family corporation from enforcing security agreement as to mortgaged property of partnership, where security agreement had been granted in breach of partnership regulatory agreement provision that there would be no encumbrance of any mortgaged property without FHA approval and where both partnership and corporation were dominated by father of family. Thompson v. United States, 408 F.2d 1075 (8th Cir. Ark. 1969).

17. Other commercial transactions.

While this particular agreement relating to a license transfer does not come within the UCC, it is a commercial transaction in the broad sense and the legislature has specifically declared in UCC § 1-203 that good faith is a basic obligation in all such transactions. Hardeman v. Liberty Mut. Ins. Co., 124 Ga. App. 710, 185 S.E.2d 789 (1971).

§ 75-1-305. Remedies to be liberally administered.

(a) The remedies provided by the Uniform Commercial Code must be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special damages nor penal damages may be had except as specifically provided in the Uniform Commercial Code or by other rule of law.

(b) Any right or obligation declared by the Uniform Commercial Code is enforceable by action unless the provision declaring it specifies a different and limited effect.

SOURCES: Present § 75-1-305 is derived from former § 75-1-106 [Codes, 1942, § 41A:1-106; Laws, 1966, ch. 316, § 1-106, eff March 31, 1968; Repealed by Laws, 2010, ch. 506, § 44, eff from and after July 1, 2010] and was enacted by Laws, 2010, ch. 506, § 3, eff from and after July 1, 2010.

Cross References — Liberal construction of code, see §§ 75-1-102, 75-1-103.
Supplementary general principles of law applicable, see § 75-1-103.
Obligation of good faith, see §§ 75-1-203, 75-1-304.
Remedies respecting sales, see § 75-2-701 et seq.
Incidental damages in case of resale by seller, see § 75-2-706.
Recovery of incidental or consequential damages by buyer, see § 75-2-712.
Specific performance of sale contract, see § 75-2-716.

JUDICIAL DECISIONS

I. UNDER CURRENT LAW.

1.-5. [Reserved for future use.]

II. UNDER FORMER § 75-1-106.

6. In general.

I. UNDER CURRENT LAW.

1.-5. [Reserved for future use.]

II. UNDER FORMER § 75-1-106.

6. In general.

Goal of cover remedy is to place buyer only in as good a position as he would have occupied had seller performed. Terex Corp. v. Ingalls Shipbuilding, Inc., 671 So. 2d 1316 (Miss. 1996).

Goal of cover remedy is to place buyer only in as good a position as he would have occupied had seller performed. Terex Corp. v. Ingalls Shipbuilding, Inc., 671 So. 2d 1316 (Miss. 1996).

The breach of a contract governed by the UCC, just as the breach of any other contract, in rare instances, may be attended by such conduct as to authorize the awarding an aggrieved party punitive damages in addition to damages for the contract's breach; however, facts in present case did not justify punitive damage award. Fedders Corp. v. Boatright, 493 So. 2d 301 (Miss. 1986).

In suit by buyer, who had purchased two irrevocable letters of credit from bank in favor of seller, to enjoin bank from paying any further drafts that seller might present against such letters and to recover damages for drafts that bank had wrongfully paid to seller, buyer did not establish right to injunctive relief by showing lack of adequate remedy at law. Although UCC Article 5 does not expressly provide measure of damages for wrongful honor of draft presented against letter of credit, UCC § 1-106(1) states that remedies provided by UCC shall be liberally administered to end that aggrieved party may be put in as good a position as if other party had fully performed. UCC § 1-106(1) is a general restatement of the common-law theory of contract damages. In present case, buyer's damages for bank's wrongful honoring of seller's prior drafts would be amount of money that would put buyer in as good a position as if bank had fully performed or, in other words, the total of the two debits made against buyer's account as a result of the two drafts that seller had presented to bank and bank had wrongfully paid. Interco, Inc. v. First Nat'l Bank, 560 F.2d 480, 22 U.C.C. Rep. Serv. 472 (1st Cir. Mass. 1977) (construing Massachusetts law, but refusing to be definitive as to exact measure of buyer's damages).

Although UCC does not explicitly allow punitive damages for commercially unreasonable sale, if that right exists outside Code, it is retained or permitted through UCC § 1-106, and since UCC permits recovery of damages in action for conversion of repossessed property, punitive damages are recoverable in such action where secured party's acts are wanton, malicious, and intentional; thus, evidence that secured party permitted third person to borrow collateral belonging to debtor prior to default in order that third party could open competing business, that bank did not give proper notice of sale and on sale date did not even attempt sale, that secured party retained collateral after default for several months without crediting it against debtor's note, and that final sale was made to third person for price less than one fourth of stipulated value of property at time of sale, was sufficient to support award of punitive damages. Davidson v. First Bank & Trust Co., 609 P.2d 1259 (Okla. 1976).

In action by purchaser of new automobile against dealer seeking revocation of acceptance and damages, contract provision between dealer and purchaser to effect that there were no warranties express or implied made by either dealer or manufacturer, other than manufacturer's warranty against defective materials, although sufficient to exclude all warranties by dealer except implied warranty of merchantability, did not eliminate implied warranty of merchantability in manner required by UCC § 2-316, and evidence that automobile battery was defective as result of poor materials or poor workmanship was sufficient to establish breach of warranty of merchantability; however, there was no evidence that such nonconformity substantially impaired value of car to purchaser as required by UCC § 2-608 before he could revoke his acceptance of automobile and recover price paid; thus, purchaser's remedy was action for damages and, since purchaser failed to present evidence to support award based on proper measure of damages, i.e., value of automobile in its non-conforming condition at time and place of acceptance, purchaser was not entitled to recover damages. Bill McDavid Oldsmobile, Inc. v. Mulcahy, 533 S.W.2d 160 (Tex. Civ. App. 1976).

That, absent contractual or statutory exclusion, manufacturer of defective product might properly be held accountable for any damages to buyer which flowed naturally from manufacturer's breach of warranty comported fully with purposes of UCC to put aggrieved party in as good position as if other party had fully performed. Council Bros. v. Ray Burner Co., 473 F.2d 400 (5th Cir. Fla. 1973).

Under UCC buyer cannot claim punitive damages on account of alleged fraud pertaining to sale of chattels. Waters v. Trenckmann, 503 P.2d 1187 (Wyo. 1972).

Party aggrieved by breach of contract is entitled to be put in as good position as if other party had fully performed, and this includes right to recover for loss of prospective profits resulting from breach, which profits may be determined on basis of combination of past earnings records and expert testimony of president of aggrieved party. Matsushita Elec. Corp. of Am. v. Sonus Corp., 362 Mass. 246, 284 N.E.2d 880 (1972).

Attorneys' fees incurred in action to recover loss of profits and incidental damages upon buyer's repudiation of contract are not in nature of protective expenses contemplated by Code. Neri v. Retail Marine Corp., 30 N.Y.2d 393, 285 N.E.2d 311 (1972).

The purpose of this act, to be liberally construed, is specified as the stipulation, clarification and modernization of the law governing commercial transactions to permit the continued expansion of commercial practices through custom, usage and agreement of the parties; and the statute mandates a liberal administration to the end that an aggrieved party may be put in as good a position as if the other party had fully performed without consequential, special, or penal damages unless specifically provided for. Chrysler Credit Corp. v. Sharp, 56 Misc. 2d 261 (1968).

The instant section merely restates the doctrine that damages are limited to just compensation for the loss sustained by reason of the breach. First Pa. Banking & Trust Co. v. Montgomery County Bank & Trust Co., 29 Pa. D. & C.2d 596 (1962).

§ 75-1-306. Waiver or renunciation of claim or right after breach.

A claim or right arising out of an alleged breach may be discharged in whole or in part without consideration by agreement of the aggrieved party in an authenticated record.

SOURCES: Present § 75-1-306 is derived from former § 75-1-107 [Codes, 1942, § 41A:1-107; Laws, 1966, ch. 316, § 1-107, eff March 31, 1968; Repealed by Laws, 2010, ch. 506, § 44, eff from and after July 1, 2010] and was enacted by Laws, 2010, ch. 506, § 3, eff from and after July 1, 2010.

Cross References — Obligation of good faith, see §§ 75-1-203, 75-1-304.
Statute of frauds, see § 75-2-201.
Modification, rescission, and waiver, see § 75-2-209.
Contractual modification or limitation of remedy, see § 75-2-719.

JUDICIAL DECISIONS

I. UNDER CURRENT LAW.

1-5. [Reserved for future use.]

II. UNDER FORMER § 75-1-107.

6. In general.

I. UNDER CURRENT LAW.

1-5. [Reserved for future use.]

II. UNDER FORMER § 75-1-107.

6. In general.

In action for breach of contract to construct mechanical loading platforms for use in distribution center building, letter sent to defendant after it became clear that defendant would not perform which cancelled contract "without charge" could not as matter of law amount to waiver or renunciation of claim arising out of breach under UCC §§ 1-107 and 2-720; under UCC § 1-205, meaning to be given phrase "without charge" would require consideration of any course of dealing between parties and any applicable trade usage. NCR v. UNARCO Indus., Inc., 490 F.2d 285 (7th Cir. Ill. 1974).

Where there was no written waiver, there was consequently no basis for discharge of breached contracts under UCC § 1-107. Gorge Lumber Co. v. Brazier Lumber Co., 6 Wash. App. 327, 493 P.2d 782 (1972).

RESEARCH REFERENCES

Am Jur. 1 Am. Jur. 2d, Accord and Satisfaction §§ 14, 26-28, 57.

15A Am. Jur. 2d, Commercial Code § 4.

17 Am. Jur. 2d, Contracts §§ 655 et seq.

28 Am. Jur. 2d, Estoppel and Waiver §§ 201 et seq.

66 Am. Jur. 2d, Release §§ 6 et seq.

6 Am. Jur. Pl & Pr Forms, (Rev), General Provisions, Form 1:4 (Answer; defense; waiver of claim or right after breach of contract).

6 Am. Jur. Pl & Pr Forms (Rev), General Provisions, Form 1:8 (Instruction to jury; effect of waiver or renunciation, without consideration, of claim or right after breach of contract).

8 Am. Jur. Legal Forms 2d, Estoppel and Waiver § 102:42 (waiver limited to particular breach).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 1 — General Provisions, §§ 253:41 et seq. (Waiver or renunciation after breach).

CJS. 17B C.J.S., Contracts §§ 557-560.

§ 75-1-307. Prima facie evidence by third-party documents.

A document in due form purporting to be a bill of lading, policy or certificate of insurance, official weigher's or inspector's certificate, consular invoice, or any other document authorized or required by the contract to be issued by a third party is prima facie evidence of its own authenticity and genuineness and of the facts stated in the document by the third party.

SOURCES: Present § 75-1-307 is derived from former § 75-1-202 [Codes, 1942, § 41A:1-202; Laws, 1966, ch. 316, § 1-202, eff March 31, 1968; Repealed by Laws, 2010, ch. 506, § 44, eff from and after July 1, 2010] and was enacted by Laws, 2010, ch. 506, § 3, eff from and after July 1, 2010.

Cross References — Evidence, generally, see §§ 13-1-1 et seq.

JUDICIAL DECISIONS

I. UNDER CURRENT LAW.

1-5. [Reserved for future use.]

II. UNDER FORMER § 75-1-202.

6. In general.

I. UNDER CURRENT LAW.

1-5. [Reserved for future use.]

II. UNDER FORMER § 75-1-202.

6. In general.

In action by common carrier to recover freight charges, bill of lading would have been admissible under UCC § 1-202, if it had been offered into evidence. Braswell Motor Freight Lines v. Tetens, 538 S.W.2d 224 (Tex. Civ. App. 1976).

Original bills of lading which plaintiff sought to introduce as its exhibits to prove alleged overcharges for real transportation were not admissible under § 1-202 where they did not involve third party. Atchison, T. & S.F. Ry. v. Lone Star Steel Co., 498 S.W.2d 512 (Tex. Civ. App. 1973).

In action by purchaser of automobiles to recover certain rebates allegedly promised it as inducement to purchase from dealer letter of correspondence between automobile manufacturer and purchaser, stating that representative of manufacturer had contacted dealer who denied contractual agreement regarding rebates, was not self-authenticating document within meaning of Code § 1-202. Thrifty Rent-A-Car Sys. v. Chuck Ruwart Chevrolet, 500 P.2d 172 (Colo. Ct. App. 1972).

"Clean" bill of lading showing that goods, which were wrapped entirely in burlap covering, were "in apparent good order and condition" was prima facie evidence as to external conditions only. Plastileather Corp. v. Aetna Cas. & Sur. Co., 361 Mass. 356, 280 N.E.2d 402 (1972).

RESEARCH REFERENCES

ALR. Verification and authentication of slips, tickets, bills, invoices, etc., made in regular course of business, under the Uniform Business Records as Evidence Act, or under similar "Model Acts." 21 A.L.R.2d 773.

Construction and effect of § 1-202 of the Uniform Commercial Code dealing with documents which are prima facie evidence of their own authenticity and genuineness. 72 A.L.R.3d 1243.

Am Jur. 15A Am. Jur. 2d, Commercial Code § 32.

29 Am. Jur. 2d, Evidence §§ 834-913.

30 Am. Jur. 2d, Evidence §§ 914-1015.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Form 2:1221 (Notice; of intent to offer evidence of substitute market price).

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Form 2:1222 (Motion; evidence of substitute market price offered without notice inadmissible).

CJS. 32 C.J.S., Evidence §§ 819, 820, 967.

§ 75-1-308. Performance or acceptance under reservation of rights.

(a) A party that with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as "without prejudice," "under protest," or the like are sufficient.

(b) Subsection (a) does not apply to an accord and satisfaction.

SOURCES: Present § 75-1-308 is derived from former § 75-1-207 [Codes, 1942, § 41A:1-207; Laws, 1966, ch. 316, § 1-207; Laws, 1992, ch. 420, § 70, eff from and after January 1, 1993; Repealed by Laws, 2010, ch. 506, § 44, eff from and after July 1, 2010] and was enacted by Laws, 2010, ch. 506, § 3, eff from and after July 1, 2010.

Cross References — Effect of acceptance, etc., see § 75-2-607.
Accord and satisfaction by use of instrument, see § 75-3-311.

JUDICIAL DECISIONS

I. UNDER CURRENT LAW.

1-5. [Reserved for future use.]

II. UNDER FORMER § 75-1-207.

6. In general.

I. UNDER CURRENT LAW.

1-5. [Reserved for future use.]

II. UNDER FORMER § 75-1-207.

6. In general.

A stamped notation on the backs of checks purporting to reserve the seller's rights (§ 75-1-207), which was done in the ordinary course of business, did not preclude a finding that the seller waived enforcement of the floor pricing provision of the parties' contract. Exxon Corp. v. Crosby-Mississippi Resources, Ltd., 40 F.3d 1474 (5th Cir. 1995).

Where defendant agreed to pay reasonable counsel fees rendered by plaintiff to a third party, and forwarded a check to plaintiff in an amount almost $800 less than the itemized statement and bill submitted by plaintiff, stating that the charges were excessive and that the check would be considered full payment if accepted, there was a bona fide dispute of an unliquidated claim, and the cashing of the check by plaintiff resulted in an accord and satisfaction; the fact that plaintiff informed defendant that he did not regard the check as full payment did not preclude the making of an accord and satisfaction, since Section 1-207 of the Uniform Commercial Code, which deals with the explicit reservation of rights, is not applicable to the rendition of services. Blottner, Derrico, Weiss & Hoffman, P.C. v. Fier, 101 Misc. 2d 371 (1979).

UCC § 1-207 precludes conclusion that payee of check, prior to its negotiation, must notify drawer that payee's acceptance is under protest or reservation of rights. Miller v. Jung, 361 So. 2d 788, 24 U.C.C. Rep. Serv. 1085 (Fla. Dist. Ct. App. 2d Dist. 1978) (stating that UCC § 1-207 minimizes impediments to flow of commercial paper while reserving rights of immediate parties thereto).

UCC § 1-207 provides machinery for the continuation of performance along the lines contemplated by the contract, despite a pending dispute, by adopting the mercantile device of going ahead with delivery, acceptance, or payment "without prejudice," "under protest," "under reserve," "with reservation of all our rights," and the like. All of these phrases completely reserve all rights within the meaning of UCC § 1-207. Miller v. Jung, 361 So. 2d 788, 24 U.C.C. Rep. Serv. 1085 (Fla. Dist. Ct. App. 2d Dist. 1978).

Common-law rule that accord and satisfaction results where check tendered as payment in full for disputed amount is accepted by payee has been changed by UCC § 1-207. Under such section, if party indorses final-payment check with words "without prejudice and under protest," party thus reserves right to demand balance alleged to be due, and negotiation of check does not effect an accord and satisfaction. Lange-Finn Constr. Co. v. Albany Steel & Iron Supply Co., 94 Misc. 2d 15 (1978).

Where (1) general contractor involved in payment dispute with steel supplier sent supplier check for certain sum as final payment of amount due and thereafter, in further effort to resolve dispute, sent supplier second check for slightly higher amount also as final payment of account, and (2) supplier, after first certifying both checks and holding them for several months, returned first check to

general contractor, deposited second check with indorsement "without prejudice and under protest," and thereafter advised general contractor that it was still asserting its claim for entire amount allegedly due, court held (1) that UCC § 1-207 was inapplicable because supplier had made no reservation of its rights at time it had second check certified, and (2) that trial court correctly concluded as a result that an accord and satisfaction had occurred as to amount in dispute on date second check was certified. Lange-Finn Constr. Co. v. Albany Steel & Iron Supply Co., 94 Misc. 2d 15 (1978).

Although the acceptance of a check tendered as final payment in full for a disputed amount with an indorsement stating that the negotiation of the check is "without prejudice" or "under protest" does not result in an accord and satisfaction (Uniform Commercial Code, § 1-207), defendant's failure to expressly reserve its rights at the time it caused plaintiff's check tendered as a final payment for materials supplied by defendant on a construction project to be certified resulted in an accord and satisfaction. Where a check is tendered as payment in full for a disputed amount and the payee causes the check to be certified, an accord and satisfaction results since certification is equivalent to acceptance by the payee. Defendant only advised plaintiff that it was still asserting its claim for the entire balance after it caused plaintiff's check to be certified. Had defendant merely negotiated the check while reserving its rights, no accord and satisfaction would have occurred. Lange-Finn Constr. Co. v. Albany Steel & Iron Supply Co., 94 Misc. 2d 15 (1978).

Under UCC § 1-207, buyers of stock, by continuing to perform under contract, did not waive right to complain of sellers' retention of dividends where, although buyers made no explicit reservation of right to dividends, buyers' actions clearly indicated that they were not waiving any rights accruing to them. Deering Milliken, Inc. v. Clark Estates, Inc., 57 A.D.2d 773 (1st Dep't 1977), aff'd, 43 N.Y.2d 545, 402 N.Y.S.2d 987, 373 N.E.2d 1212 (1978).

Rights which cotton sellers had, in event of reversal of their appeal from trial court judgment that certain written contracts between sellers and buyer were valid agreements, were fixed by statutes relating to reversal of judgments on appeal; UCC § 1-207 did not apply. Peek Planting Co. v. W.H. Kennedy & Sons, 257 Ark. 669, 519 S.W.2d 49 (1975).

Indorsement with explicit reservations is not acceptance in full payment but reservation of right to collect remainder of unpaid bill. Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969).

RESEARCH REFERENCES

ALR. Application of UCC § 1-207 to avoid discharge of disputed claim upon qualified acceptance of check tendered as payment in full. 37 A.L.R.4th 358.

Am Jur. 15A Am. Jur. 2d, Commercial Code § 33.

17 Am. Jur. 2d, Contracts §§ 199, 655, 656.

6 Am. Jur. Pl & Pr Forms (Rev), General Provisions, Form 1:34 (Instruction to jury; effect of explicit reservation of rights; what words are sufficient to protect reserved rights).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 1 — General Provisions, §§ 253:111 et seq. (Performance or acceptance under reservation of rights).

27 Am. Jur. Proof of Facts 2d 559, Offeree's Acceptance of Contract Offer.

§ 75-1-309. Option to accelerate at will.

A term providing that one (1) party or that party's successor in interest may accelerate payment or performance or require collateral or additional collateral "at will" or when the party "deems itself insecure," or words of similar import, means that the party has power to do so only if that party in good faith

believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against which the power has been exercised.

SOURCES: Present § 75-1-309 is derived from former § 75-1-208 [Codes, 1942, § 41A:1-208; Laws, 1966, ch. 316, § 1-208, eff March 31, 1968; Repealed by Laws, 2010, ch. 506, § 44, eff from and after July 1, 2010] and was enacted by Laws, 2010, ch. 506, § 3, eff from and after July 1, 2010.

Cross References — Obligation of good faith in performance or enforcement of contract or duty, see § 75-1-203.

Reinstatement of accelerated debt secured by deed of trust or other lien upon payment of default before sale, see § 89-1-59.

JUDICIAL DECISIONS

I. UNDER CURRENT LAW.

1. -10. [Reserved for future use.]

II. UNDER FORMER § 75-1-208.

11. In general; necessity of express provision for acceleration.
12. Construction of acceleration clauses.
13. What constitutes good faith.
14. Circumstances justifying exercise of option.
15. What constitutes demand for additional collateral.
16. Presumptions.
17. Burden of proof.

I. UNDER CURRENT LAW.

1. -10. [Reserved for future use.]

II. UNDER FORMER § 75-1-208.

11. In general; necessity of express provision for acceleration.

Section 75-1-208 is inapplicable to situations where a creditor, under the terms of its contract with the debtor, has accelerated its debtor's outstanding obligations after the occurrence of an event that was in the complete control of the debtor-i.e., where the creditor accelerates indebtedness because the debtor fails to comply with the terms and conditions contained in the promissory note, deed of trust, or loan agreement. Peoples Bank & Trust Co. v. Cermack, 658 So. 2d 1352 (Miss. 1995).

Although UCC does recognize validity of acceleration clauses under certain circumstances, if such clause is expressly set forth in instrument, UCC makes no provision for automatic acceleration upon default of installment payments not yet due; thus, where so-called "lease-purchase" agreement did not contain acceleration clause, installment payments could not be accelerated upon default and creditor was limited to recovery of unpaid installments then actually accrued. GECC v. Castiglione, 142 N.J. Super. 90, 360 A.2d 418 (1976).

There is no right to accelerate commercial paper in the absence of an express provision therefor. McDown v. Wilson, 426 S.W.2d 112 (Mo. Ct. App. 1968).

12. Construction of acceleration clauses.

An acceleration clause is not to be interpreted as exercisable only when the paper is given to an attorney for collection, even though the absence of punctuation in the note would appear to give the clause that meaning. Olsen v. Valley Nat'l Bank, 91 Ill. App. 2d 365, 234 N.E.2d 547 (2d Dist. 1968).

13. What constitutes good faith.

Ordinarily, the issue of whether the holder of an option to accelerate has or has not acted in good faith, within the meaning of UCC § 1-208, presents a question of fact for the jury and not a question of law for the court. Thus, under UCC § 1-208, the issue of good faith must ordinarily be submitted to the jury, unless the evidence relating to it is no more than a scintilla or lacks probative value having fitness to induce conviction in the minds of reasonable men. McKay v. Farmers & Stockmens

Bank, 92 N.M. 181, 585 P.2d 325 (Ct. App. 1978), cert. denied, 92 N.M. 79, 582 P.2d 1292 (1978).

In action to foreclose security interest in both real and personal property of defendant mink ranchers pursuant to acceleration clause in security agreement, trial court's findings in favor of plaintiff were sustained by evidence showing (1) that such acceleration clause provided that defendants would be in default if they did not pay any of three promissory notes when due, or did not perform any undertaking provided for in notes or security agreement, or if any part of collateral for notes should be lost, stolen, or damaged; and (2) that all notes were in default, that defendants had not cared for the mink (which were part of collateral) in husbandlike manner, and that defendants claimed that mink pelts worth $25,000 had been stolen. In such case, defendants did not sustain their burden of proof under UCC § 1-208 to show lack of good faith on part of plaintiff in declaring notes in default and in accelerating payment thereof, since plaintiff genuinely believed that its prospects for payment had been impaired. State Bank v. Woolsey, 565 P.2d 413 (Utah 1977).

In view of fact that promissory note was secured by second mortgage on farm property which defendant had purchased for $110,000, there could be little doubt that note would have been paid, principal and interest, notwithstanding fact that defendants were frequently late in making monthly installment payments on note, and thus holders of promissory note failed to show good faith belief that prospect of payment was impaired justifying acceleration of note under UCC § 1-208. Williamson v. Wanlass, 545 P.2d 1145 (Utah 1976).

Even if UCC § 1-208 was applicable to contracts involving land, it imposes "good faith" standard on creditor where it is agreed that he may accelerate debt at his option, and thus did not apply to due-on-sale clause contained in deed of trust since right to accelerate was conditioned on occurrence of condition which was in control of debtor. Crockett v. First Fed. Sav. & Loan Ass'n, 289 N.C. 620, 224 S.E.2d 580 (1976).

In action by trustee in bankruptcy to recover amount of funds bank had set off against bankrupt's checking account, finding that bank had acted in good faith within meaning of UCC § 1-208 was not clearly erroneous where bank, which had perfected security interest in bankrupt's cattle, discovered prior security interest in same cattle, deemed itself insecure, and, pursuant to clause contained in promissory notes executed by bankrupt in favor of bank, accelerated notes' due date, notwithstanding that bank gave no notification of acceleration and setoff to bankrupt. Jensen v. State Bank, 518 F.2d 1 (8th Cir. Iowa 1975).

Grain elevator cooperative failed to produce substantial evidence that bank was not in good faith in accelerating elevator's promissory notes where, on contrary, there was evidence that elevator owed bank $272,000 and needed additional $50,000 within next 2 weeks, that elevator had more checks outstanding than its bank balance, that elevator had loss of $22,000 in fiscal year just completed and that elevator closed for 2 business days. Farmers Coop. Elevator v. State Bank, 236 N.W.2d 674 (Iowa 1975).

Where security agreement, executed in connection with sale of truck, provided that secured party could not only accelerate payment thereunder but also repossess truck without demand or notice if secured party felt insecure, test as to whether secured party acted in "good faith" under UCC § 1-208 in repossessing truck was whether "reasonable man" under same set of facts or circumstances would have made same determination as to whether debt or collateral were insecure. Universal C.I.T. Credit Corp. v. Shepler, 164 Ind. App. 516, 329 N.E.2d 620 (1975).

Plaintiff, as an unsecured creditor, had to consider the overall financial stability of defendant corporation in order to determine the likelihood of payment being made on loans previously extended to corporation by plaintiff, and even if plaintiff was negligent in not checking to determine whether defendant had in fact been denied a loan by third party, negligence was irrelevant to good faith, the standard being what plaintiff actually knew, or be-

lieved he knew, not what he could or should have known, and because plaintiff believed defendant had been denied a loan, and acted in accordance with that belief, he acted in good faith in demanding payments of notes. Van Horn v. Van De Wol, Inc., 6 Wash. App. 959, 497 P.2d 252, 61 A.L.R.3d 241 (1972).

14. Circumstances justifying exercise of option.

Plaintiff bank is entitled to liquidate municipal bonds held as collateral for loans made to defendant securities dealer since plaintiff had adequate cause to "deem itself insecure", a condition constituting default under the parties' security agreement, where defendant had engaged in wash sales to postpone the effect of losses occasioned by the declining bond market. Bankers Trust Co. v. J.V. Dowler & Co., 47 N.Y.2d 128, 390 N.E.2d 766 (1979).

Where creditor loaned debtor $250,000 for five-year period and loan was evidenced by one-year note that was renewable solely at debtor's option if all interest payments were made during first year of loan; where collateral for loan was second mortgage on building and surety bond for $250,000 that only covered first year of loan; where debtor failed to make interest payments during first year and surety cured such default by paying all interest arrearages; where before start of second year of loan, creditor's request that debtor obtain extension of its surety bond was not complied with; and where creditor then refused debtor's request to renew note for second year and claimed that note was fully due and payable under acceleration clause therein, which was of type permitted by UCC § 1-208, because creditor deemed collateral insufficient to secure entire indebtedness, creditor's demand for extension of debtor's surety bond was not demand for "additional collateral" within meaning of note's acceleration clause and UCC § 1-208, since right to demand "additional collateral" does not mean right to demand "temporal extension of same collateral" in case where parties expressly bargained for expiration of collateral (surety bond in present case) at precise date within term of principal debt and such agreed-on collateral currently covered debtor's full indebtedness. Bank of N.J. v. Brokers Fin. Corp., 557 F.2d 365 (3d Cir. 1977), cert. denied, 434 U.S. 924, 98 S. Ct. 402, 54 L. Ed. 2d 281 (1977).

"Good faith" requirement of UCC § 1-208 is in harmony with equitable principle that acceleration of payment of instrument in harsh remedy that should be allowed only for some reasonable justification, such as good-faith belief that prospect of payment has been impaired. State Bank v. Woolsey, 565 P.2d 413 (Utah 1977).

Under UCC § 1-208, conditional vendor of automobile was justified in exercising its "insecurity clause" and accelerating payment of balance due under conditional sales contract where conditional purchaser was charged with illegally transporting controlled substances in violation of state law, thereby subjecting vehicle to possible forfeiture proceedings by state and federal governments. Blaine v. GMAC, 82 Misc. 2d 653 (1975).

A bank, in enforcing its security interest in a roadside diner was not guilty of abuse of process in so doing where the facts justified the institution in deeming itself insecure and, as a matter of law, it acted in good faith. Fort Knox Nat'l Bank v. Gustafson, 385 S.W.2d 196 (Ky. 1964).

15. What constitutes demand for additional collateral.

Under language of retail instalment contract which provided that upon buyer's default seller would have right, at its election, to declare unpaid portion of total payments to be immediately due and payable, entire indebtedness did not become due ipso facto upon default in making of instalment payment on due date thereof, and creditor could not effectively exercise option to declare whole principal due without communicating his decision to debtor by some outward affirmative act sufficient to constitute notice of his election. Chrysler Credit Corp. v. Barnes, 126 Ga. App. 444, 191 S.E.2d 121 (1972).

16. Presumptions.

Creditor exercising power to accelerate payment is presumed to have acted in good faith; trial court erroneously turned presumption around when it placed bur-

den of proof on creditor. Sheppard Fed. Credit Union v. Palmer, 408 F.2d 1369 (5th Cir. Tex. 1969).

17. Burden of proof.

Under the last sentence of UCC § 1-208, the burden of establishing a lack of good faith is on the debtor. This burden applies to the quantum of evidence and sufficiency of proof as to the lack of good faith after all of the evidence is before the court. Such a burden, however, does not apply on a motion for summary judgment where the sole question before the court is whether a genuine issue of material fact exists; in such a case, the movant has the burden of proving the absence of a genuine issue of fact. McKay v. Farmers & Stockmens Bank, 92 N.M. 181, 585 P.2d 325 (Ct. App. 1978), cert. denied, 92 N.M. 79, 582 P.2d 1292 (1978).

Bank exercised good faith within meaning of UCC § 1-208 in accelerating payment date of note executed by debtor where debtor failed to sustain its burden of showing lack of good faith on bank's part and bank's evidence showed extent of debtor's indebtedness to other creditors and degree to which debtor was in default on such other indebtedness. Custom Panel Sys. v. Bank of Hampton, 143 Ga. App. 681, 239 S.E.2d 558 (1977) (holding that under express terms of note executed by debtor, bank could appropriate without notice, for application on note, amount in debtor's account with bank).

RESEARCH REFERENCES

ALR. Provision for acceleration on death as affecting instrument's character and validity as contract. 1 A.L.R.2d 1206.

What is essential to exercise of option to accelerate maturity of bill or note. 5 A.L.R.2d 968.

"Insecurity" acceleration or repossession clause as affecting question whether transferee of commercial paper given by purchaser of chattel and secured by conditional sale, retention of title, or chattel mortgage, as subject to defenses which chattel purchaser could assert against seller. 44 A.L.R.2d 84.

What constitutes "good faith" under Uniform Commercial Code § 1-208 dealing with "insecure" or "at will" acceleration clauses. 61 A.L.R.3d 244.

What constitutes "good faith" under UCC § 1-208 dealing with "insecure" or "at will" acceleration clauses. 85 A.L.R.4th 284.

Am Jur. 11 Am. Jur. 2d, Bills and Notes §§ 110-111.

15A Am. Jur. 2d, Commercial Code § 34.

17 Am. Jur. 2d, Contracts § 493.

6 Am. Jur. Pl & Pr Forms (Rev), General Provisions, Form 1:22 (Complaint, petition, or declaration; allegation; acceleration of payment).

6 Am. Jur. Pl & Pr Forms (Rev), General Provisions, Form 1:24 (Answer; defense; absence of good faith on part of plaintiff in exercising option to require additional collateral).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 1 — General Provisions, §§ 121-136 (Acceleration and additional collateral provisions).

3 Am. Jur. Proof of Facts, Credit, Proof Nos. 1, 2 (proof of impairment of credit).

Law Reviews. 1983 Mississippi Supreme Court Review: Subjective or objective standard of "good faith." 54 Miss. L. J. 110, March, 1984.

1987 Mississippi Supreme Court Review: Lender liability in Mississippi: a survey, comparison, and comment. 57 Miss. L. J. 1, April 1987.

Williamson and Redfern, Lender liability in Mississippi: Part II loan commitments and agreements. 59 Miss. L. J. 71, Spring, 1989.

§ 75-1-310. Subordinated obligations.

An obligation may be issued as subordinated to performance of another obligation of the person obligated, or a creditor may subordinate its right to performance of an obligation by agreement with either the person obligated or

another creditor of the person obligated. Subordination does not create a security interest as against either the common debtor or a subordinated creditor.

SOURCES: Sources: Laws, 2010, ch. 506, § 3, eff from and after July 1, 2010.

CHAPTER 2

Uniform Commercial Code — Sales

Part 1. Short Title, General Construction and Subject Matter.....75-2-101
Part 2. Form, Formation and Readjustment of Contract.....75-2-201
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Part 4. Title, Creditors and Good Faith Purchasers.....75-2-401
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Part 7. Remedies.....75-2-701

PART 1.

SHORT TITLE, GENERAL CONSTRUCTION AND SUBJECT MATTER.

SEC.
75-2-103. Definitions and index of definitions.
75-2-104. Definitions: "merchant"; "financing agency"; "between merchants."
75-2-107. Goods to be severed from realty; recording.

§ 75-2-102. Scope; certain security and other transactions excluded from this chapter.

JUDICIAL DECISIONS

7. What constitutes goods.

In borrowers' suit alleging fraudulent loan transactions, the borrowers' unconscionability claims were not viable, because the sale of insurance did not fit within the ambit of what could be considered "goods" as defined in the Uniform Commercial Code (UCC) and unconscionability under the UCC was applicable only within the context of a sale of goods. Ross v. First Family Fin. Servs., Inc., — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 23212 (N.D. Miss. Aug. 26, 2002).

§ 75-2-103. Definitions and index of definitions.

(1) In this chapter unless the context otherwise requires:

(a) "Buyer" means a person that buys or contracts to buy goods.

(b) [Reserved]

(c) "Receipt" of goods means taking physical possession of them.

(d) "Seller" means a person who sells or contracts to sell goods.

(2) Other definitions applying to this chapter or to specified parts thereof, and the sections in which they appear are:

"Acceptance" Section 75-2-606
"Banker's credit" Section 75-2-325

"Between merchants"	Section 75-2-104
"Cancellation" Section	Section 75-2-106(4)
"Commercial unit"	Section 75-2-105
"Confirmed credit"	Section 75-2-325
"Conforming to contract"	Section 75-2-106
"Contract for sale"	Section 75-2-106
"Cover"	Section 75-2-712
"Entrusting"	Section 75-2-403
"Financing agency"	Section 75-2-104
"Future goods"	Section 75-2-105
"Goods"	Section 75-2-105
"Identification"	Section 75-2-501
"Installment contract"	Section 75-2-612
"Letter of Credit"	Section 75-2-325
"Lot"	Section 75-2-105
"Merchant"	Section 75-2-104
"Overseas"	Section 75-2-323
"Person in position of seller"	Section 75-2-707
"Present sale"	Section 75-2-106
"Sale"	Section 75-2-106
"Sale on approval"	Section 75-2-326
"Sale or return"	Section 75-2-326
"Termination"	Section 75-2-106

(3) The following definitions in other chapters apply to this chapter:

"Check"	Section 75-3-104
"Consignee"	Section 75-7-102
"Consignor"	Section 75-7-102
"Consumer goods"	Section 75-9-102
"Control"	Section 75-7-106
"Dishonor"	Section 75-3-502
"Draft"	Section 75-3-104

(4) In addition Chapter 1 contains general definitions and principles of construction and interpretation applicable throughout this chapter.

SOURCES: Codes, 1942, § 41A:2-103; Laws, 1966, ch. 316, § 2-103; Laws, 2001, ch. 495, § 6; Laws, 2006, ch. 527, § 42; Laws, 2010, ch. 506, § 4, eff from and after July 1, 2010.

Amendment Notes — The 2006 amendment added the section reference for the definition of "Control" in (3).

The 2010 amendment made a stylistic change in (1)(a); and substituted "reserved" for former (1)(b), which was the definition for "good faith."

§ 75-2-104. Definitions: "merchant"; "financing agency"; "between merchants."

(1) "Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the

practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

(2) "Financing agency" means a bank, finance company or other person who in the ordinary course of business makes advances against goods or documents of title or who by arrangement with either the seller or the buyer intervenes in ordinary course to make or collect payment due or claimed under the contract for sale, as by purchasing or paying the seller's draft or making advances against it or by merely taking it for collection whether or not documents of title accompany or are associated with the draft. "Financing agency" includes also a bank or other person who similarly intervenes between persons that are in the position of seller and buyer in respect to the goods (Section 75-2-707).

(3) "Between merchants" means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants.

SOURCES: Codes, 1942, § 41A:2-104; Laws, 1966, ch. 316, § 2-104; Laws, 2006, ch. 527, § 43, eff from and after July 1, 2006.

Amendment Notes — The 2006 amendment, in (2), inserted "or are associated with" preceding "the draft" near the end of the first sentence, and in the last sentence, substituted "that" for "who" following "between persons" and "(Section 75-2-707)" for "(Section 2-707)."

JUDICIAL DECISIONS

1.5. Applicability.
2. Merchants.
4. —Warranties.

1.5. Applicability.

Summary judgment in favor of a seller was approved as the seller had not placed his truck up for sale before a buyer approached him and asked to buy it, and the seller did not represent that the truck would meet the buyer's specific need. Lacy v. Morrison, 906 So. 2d 126 (Miss. Ct. App. 2004).

2. Merchants.

4. —Warranties.

Trial court erred in granting summary judgment in favor of a seller on the grounds that a seller was not a merchant, as a claim for a warranty of fitness did not require a merchant seller; appellate court affirmed the grant of summary judgment on other grounds however. Lacy v. Morrison, 906 So. 2d 126 (Miss. Ct. App. 2004).

§ 75-2-105. Definitions: transferability; "goods"; "future" goods; "lot"; "commercial unit."

JUDICIAL DECISIONS

2. Goods.
12. Insurance contracts.

2. Goods.

In borrowers' suit alleging fraudulent loan transactions, the borrowers' unconscionability claims were not viable, because the sale of insurance did not fit within the ambit of what could be considered "goods" as defined in the Uniform Commercial Code (UCC) and unconscio-

nability under the UCC was applicable only within the context of a sale of goods. Ross v. First Family Fin. Servs., Inc., — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 23212 (N.D. Miss. Aug. 26, 2002).

12. Insurance contracts.

Insureds could not cannot prevail on their claim of unconscionability under the Uniform Commercial Code of Mississippi where the insurance contracts at issue were not goods as defined by Miss. Code Ann. § 75-2-105. Ross v. Citifinancial, Inc., — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 26733 (S.D. Miss. Mar. 18, 2002), amended by 2002 U.S. Dist. LEXIS 26740 (S.D. Miss. May 8, 2002), affirmed by, remanded by 344 F.3d 458, 2003 U.S. App. LEXIS 18068 (5th Cir. Miss. 2003).

Insurance contracts are not goods as defined by Miss. Code Ann. § 75-2-105. Ross v. Citifinancial, Inc., — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 26733 (S.D. Miss. Mar. 18, 2002), amended by 2002 U.S. Dist. LEXIS 26740 (S.D. Miss. May 8, 2002), affirmed by, remanded by 344 F.3d 458, 2003 U.S. App. LEXIS 18068 (5th Cir. Miss. 2003).

Insured claimants' collateral protection insurance contracts were not goods as defined by Miss. Code Ann. § 75-2-105 and accordingly, as a matter of law, their claim of unconscionability under the Uniform Commercial Code against individual agents failed. Howard v. CitiFinancial, Inc., 195 F. Supp. 2d 811 (S.D. Miss. 2002), aff'd sub nom. Ross v. Citifinancial, Inc., 344 F.3d 458 (5th Cir. 2003).

§ 75-2-107. Goods to be severed from realty; recording.

(1) A contract for the sale of minerals or the like (including oil and gas) or a structure or its materials to be removed from realty is a contract for the sale of goods within this chapter if they are to be severed by the seller but until severance a purported present sale thereof which is not effective as a transfer of an interest in land is effective only as a contract to sell.

(2) A contract for the sale apart from the land of growing crops or other things attached to realty and capable of severance without material harm thereto but not described in subsection (1) or of timber to be cut is a contract for the sale of goods within this chapter whether the subject matter is to be severed by the buyer or by the seller even though it forms part of the realty at the time of contracting, and the parties can by identification effect a present sale before severance.

(3) The provisions of this section are subject to any third-party rights provided by the law relating to realty records, including the priority of previously recorded deeds of trust under Section 89-5-5, and the contract for sale may be executed and recorded as a document transferring an interest in land and shall then constitute notice to third parties of the buyer's rights under the contract for sale.

SOURCES: Codes, 1942, § 41A:2-107; Laws, 1966, ch. 316, § 2-107; Laws, 1977, ch. 452, § 3; Laws, 2010, ch. 506, § 5, eff from and after July 1, 2010.

Amendment Notes — The 2010 amendment inserted "including the priority of previously recorded deeds of trust under Section 89-5-5" in (3).

JUDICIAL DECISIONS

5. Crops or timber.

Pursuant to Miss. Code Ann. § 75-2-107(3), the bank had a perfected security interest in timber on land in which it held a deed of trust, and the rights of any subsequent purchasers of that timber were subordinate to the interest of the bank; the bank's failure to perfect its interests under the UCC was irrelevant to its right to remain secure. Feliciana Bank & Trust v. Manuel & Sessions, L.L.C., 943 So. 2d 736 (Miss. Ct. App. 2006).

PART 2.

FORM, FORMATION AND READJUSTMENT OF CONTRACT.

SEC.

75-2-202. Final written expression; parol or extrinsic evidence.
75-2-208. Repealed.

§ 75-2-201. Formal requirements; statute of frauds.

JUDICIAL DECISIONS

G. Decisions Under Former Statutes.

64. Note or memorandum.

G. Decisions Under Former Statutes.

64. Note or memorandum.

Cited in Bell v. State, 910 So. 2d 640 (Miss. Ct. App. 2005).

RESEARCH REFERENCES

ALR. Satisfaction of statute of frauds by e-mail. 110 A.L.R.5th 277.

§ 75-2-202. Final written expression; parol or extrinsic evidence.

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented:

(a) By course of performance, course of dealing or usage of trade (Section 75-1-303); and

(b) By evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

SOURCES: Codes, 1942, § 41A:2-202; Laws, 1966, ch. 316, § 2-202, eff March 31, 1968; Laws, 2010, ch. 506, § 6, eff from and after July 1, 2010.

Amendment Notes — The 2010 amendment made a stylistic change in the introductory paragraph; and rewrote (1)(a), which formerly read: "by course of dealing or usage of trade (Section 1-205) [Section 75-1-205] or by course of performance (Section 2-208) [Section 75-2-208]."

§ 75-2-204. Formation in general.

JUDICIAL DECISIONS

5. Conduct of parties.

Because a contractor ratified the course of conduct by paying on account for items purchased from a supply company on delivery tickets that were not signed by himself or his employees, the defense with without merit under Miss. Code Ann. § 75-2-204(1); because the record contained overwhelming evidence of an obligation owed by the contractor to the supply company for goods delivered on signed and unsigned delivery tickets, entry of judgment notwithstanding the verdict in favor of the supply company was proper, but there was evidence to suggest that mistakes in the invoices were made, and a new trial on the issue of damages alone was ordered. Natchez Elec. & Supply Co. v. Johnson, 968 So. 2d 358 (Miss. 2007).

§ 75-2-208. Repealed.

Repealed by Laws of 2010, ch. 506, § 45, effective July 1, 2010.

§ 75-2-208. [Codes, 1942, § 41A:2-208; Laws, 1966, ch. 316, § 2-208, eff March 31, 1968.]

Editor's Note — Former § 75-2-208 related to the practical construction of course of performance for purposes of the UCC Article 2. For similar present provisions, see § 75-1-303, which integrates the course of performance concept from this section and § 75-2A-207 into the principles of former § 75-1-205.

Part 3.

General Obligation and Construction of Contract.

Sec.

75-2-310. Open time for payment or running of credit; authority to ship under reservation.
75-2-323. Form of bill of lading required in overseas shipment; "overseas."

§ 75-2-302. Unconscionable contract or clause.

JUDICIAL DECISIONS

A. In general.

1. Generally.

B. Procedure.

10. Appellate review.

C. Unconscionability of Particular Matters.

11. In general.
11.5 Arbitration Provisions.
22. Procedural limitations.

23. —Form of action; election of remedies.
25. Waiver of defenses.
29. Other matters as unconscionable.

A. In general.

1. Generally.

Arbitration agreement was not avoided based on a consumer's contention that the agreement was unenforceable on grounds of unconscionability under Miss. Code Ann. § 75-2-302; the consumer, who was legally blind, failed to establish either procedural unconscionability based on his lack of knowledge and sophistication or substantive unconscionability based on his unsupported allegations of bias. Am. General Fin. Servs. v. Griffin, 327 F. Supp. 2d 678 (N.D. Miss. 2004).

B. Procedure.

10. Appellate review.

Limitation on liability cause was unenforceable in an arbitration clause and was stricken from the contractual agreement. However, pursuant to Miss. Code Ann. § 75-2-302, the remainder of the clause was valid. Vicksburg Partners, L.P. v. Stephens, 911 So. 2d 507 (Miss. 2005).

C. Unconscionability of Particular Matters.

11. In general.

Mississippi Supreme Court chose to enforce the remainder of the agreement contract between the decedent and the nursing home without the unconscionable clause; if a court struck a portion of an agreement as being void, the remainder of the contract was binding. Covenant Health Rehab of Picayune, L.P. v. Brown, 949 So. 2d 732 (Miss. 2007).

11.5 Arbitration Provisions.

Provision whereby a limited exception to arbitration was given only to the corporation to obtain possession of the subject vehicle by replevin in the event of plaintiff's default under the terms of the sales contract did not render the arbitration agreement substantively unconscionable. Sawyers v. Herrin-Gear Chevrolet Co., 26 So. 3d 1026 (Miss. 2010).

22. Procedural limitations.

23. —Form of action; election of remedies.

Arbitration agreement that a borrower signed as part of a consumer loan transaction was not unconscionable; the borrower did not claim a lack of ability to read or understand the agreement or that the borrower was prevented from reading the agreement, and the agreement was a separate, clearly marked document. First Family Fin. Servs., Inc. v. Sanford, 203 F. Supp. 2d 662 (N.D. Miss. 2002).

25. Waiver of defenses.

District court granted summary judgment in favor of a lender, compelling arbitration, where the borrower had clearly waived her right to a jury trial, and her allegations that the agreement was fraudulent or unconscionable were unfounded. Citifinancial, Inc. v. Kelley, — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 25161 (N.D. Miss. July 7, 2003).

29. Other matters as unconscionable.

There was no evidence that an arbitration agreement was unconscionable where the borrower of a commercial loan did not assert the lack of the ability to read or understand the agreement or any behavior on the part of the insurance company or the lender that prevented a careful reading of the agreement. N. Am. Ins. Co. v. Moore, — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 22753 (N.D. Miss. Aug. 29, 2002), affirmed by 71 Fed. Appx. 441, 2003 U.S. App. LEXIS 13154 (5th Cir. Miss. 2003).

§ 75-2-306. Output, requirements and exclusive dealings.

JUDICIAL DECISIONS

2. Requirements contracts.

While the contract at issue did not contain the phrase "buyers agree to buy all fill dirt for the project," the wording that was used in the contract implied exactly that; there would be no reason to have included the wording "all fill dirt for project" unless the corporation intended to buy all the fill

dirt needed for the project from the particular sellers in the contract, and the trial court's finding that the contract was a requirements contract was affirmed. G.B. "Boots" Smith Corp. v. Cobb, 860 So. 2d 774 (Miss. 2003).

§ 75-2-310. Open time for payment or running of credit; authority to ship under reservation.

Unless otherwise agreed:

(a) Payment is due at the time and place at which the buyer is to receive the goods even though the place of shipment is the place of delivery; and

(b) If the seller is authorized to send the goods he may ship them under reservation, and may tender the documents of title, but the buyer may inspect the goods after their arrival before payment is due unless such inspection is inconsistent with the terms of the contract (Section 75-2-513); and

(c) If delivery is authorized and made by way of documents of title otherwise than by subsection (b) then payment is due regardless of where the goods are to be received (i) at the time and place at which the buyer is to receive delivery of the tangible documents or (ii) at the time the buyer is to receive delivery of the electronic documents and at the seller's place of business or if none, the seller's residence; and

(d) Where the seller is required or authorized to ship the goods on credit the credit period runs from the time of shipment but postdating the invoice or delaying its dispatch will correspondingly delay the starting of the credit period.

SOURCES: Codes, 1942, § 41A:2-310; Laws, 1966, ch. 316, § 2-310; Laws, 2006, ch. 527, § 44, eff from and after July 1, 2006.

Amendment Notes — The 2006 amendment substituted "(Section 75-2-513)" for "(Section 2-513)" at the end of (b) and rewrote (c).

§ 75-2-313. Express warranties by affirmation, promise, description, sample.

JUDICIAL DECISIONS

11. Affirmation of fact or promise.
25. —Machinery and equipment; tanks and pipes.

11. Affirmation of fact or promise.

25. —Machinery and equipment; tanks and pipes.

Because a plaintiff who is injured due to a breach of warranty may recover from each seller of the individual product which caused the injury (so long as the product was defective when each respective seller possessed it), and because privity is not a requirement for negligence, strict liability or breach of warranty, plaintiff's negligence and breach of warranty claims against defendant manufacturer survived a motion to dismiss. Tellus Operating Group, L.L.C. v. R & D Pipe Co., 377 F. Supp. 2d 604 (S.D. Miss. July 19, 2005).

§ 75-2-314. Implied warranty; merchantability; usage of trade; sale of specified animals; computer hardware and software.

JUDICIAL DECISIONS

A. In General.

1. Generally.
2. Disclaimer or exclusion.

B. Scope of Warranty.

11. "Merchant with respect to goods of that kind."
15. Food and drink.

C. Requisites of Merchantability.

23. Fitness for ordinary purposes.
26. —New motor vehicles and related equipment.
43. Proximate cause.
46. Evidence and burden of proof.

A. In General.

1. Generally.

In applying Miss. Code Ann. § 75-2-314, the implied warranty of merchantability is not intended to guarantee that the goods be the best or of the highest quality—the standard is measured by the generally acceptable quality under the description in the contract. Where a product conforms to the quality of other similar products in the market, it will normally be merchantable. Johnson v. Davidson Ladders, Inc., 403 F. Supp. 2d 544 (N.D. Miss. 2005), affirmed by 193 Fed. Appx. 349, 2006 U.S. App. LEXIS 20526 (5th Cir. Miss. 2006).

2. Disclaimer or exclusion.

Miss. Code Ann. § 75-2-315.1 is specifically excepted from the non-disclaimer statute, Miss. Code Ann. § 11-7-18; this fact, together with a plain reading of Miss. Code Ann. § 75-2-315.1 itself, makes abundantly clear that the Mississippi Legislature intends to permit the disclaimer of implied warranties in contracts for the sale of late-model used vehicles. Therefore, a buyer's act of signing an "as is" agreement when purchasing a used vehicle was sufficient to waive these warranties. Murray v. Blackwell, 966 So. 2d 901 (Miss. Ct. App. 2007).

B. Scope of Warranty.

11. "Merchant with respect to goods of that kind."

Trial court did not err in holding that the buyer failed to make out a prima facie case for breach of the implied warranty of merchantability after purchasing a lame horse where the seller was not a merchant with respect to goods of that kind, i.e. horses, under the meaning of Miss. Code Ann. § 75-2-314 (Rev. 2001). Ladner v. Jordan, 848 So. 2d 870 (Miss. Ct. App. 2002).

15. Food and drink.

Plaintiffs did not establish a claim for breach of the implied warranty of merchantability as plaintiffs produced no evidence, beyond mere speculation, that there was a toothpick in the prime rib that the wife ate when it was served to her. Thus, there was no claim under Miss. Code Ann. § 75-2-314. Thomas v. HWCC-Tunica, Inc., 915 So. 2d 1092 (Miss. Ct. App. 2005).

While there was no expert medical testimony presented by the customer, the trial judge was as convinced as any layperson who sat on a jury, that eating food where a roach was found, would induce nausea and vomiting; this was further supported by the hospital records that indicated that the customer got sick from eating part of a roach at the enterprise, and, therefore, the findings of liability on the part of the enterprise, for breach of an implied warranty of merchantability, were supported by the evidence. CEF Enters. v. Betts, 838 So. 2d 999 (Miss. Ct. App. 2003).

C. Requisites of Merchantability.

23. Fitness for ordinary purposes.

Since a stepladder complied with the applicable ANSI and OSHA regulations in

its design and manufacture, and the stepladder was not defective in the sense that it deviated in quality compared to similar products in the market, plaintiffs in a products liability case failed to demonstrate a triable issue of fact on an implied warranty of merchantability claim. Johnson v. Davidson Ladders, Inc., 403 F. Supp. 2d 544 (N.D. Miss. 2005), affirmed by 193 Fed. Appx. 349, 2006 U.S. App. LEXIS 20526 (5th Cir. Miss. 2006).

In a suit alleging a breach of the implied warranty of merchantability for an ordinary purpose, summary judgment for a casket company was proper because the ordinary purpose for which a casket was designed ceased once the pall bearers bore the casket from the hearse to the grave site for burial, and the record did not indicate that plaintiffs ever stated a specified period of time that they, as a reasonable customer, would have reasonably expected the wooden casket to last. Moss v. Batesville Casket Co., 935 So. 2d 393 (Miss. 2006).

26. —New motor vehicles and related equipment.

Where the manufacturer's telescoping mast performed exactly as intended when it left the manufacturer's control and it performed exactly as intended on the day of decedent's accident, the court found that the decedent's relatives' did not carry their burden of proving that the masts violated the implied warranty of merchantability as governed by Miss. Code Ann. § 75-2-314. Austin v. Will-Burt Co., 232 F. Supp. 2d 682 (N.D. Miss. 2002), aff'd, 361 F.3d 862 (5th Cir. 2004).

43. Proximate cause.

Driver's claims against a van seller and manufacturer for breach of the implied warranty of merchantability under Miss. Code Ann. § 75-2-314 failed because there was no proof that a collision of the van with a car was caused by an alleged steering defect. Watson Quality Ford, Inc. v. Casanova, 999 So. 2d 830 (Miss. 2008).

46. Evidence and burden of proof.

In a landscaping company's suit alleging breach of the warranty of merchantability as to certain tractors, it was not entitled to a judgment notwithstanding the verdict because while it presented evidence showing that the tractors did not perform as expected, the seller and manufacturer presented sufficient evidence to the contrary, including evidence that the company operated the tractors well in excess of the average number of hours for such equipment. Duett Landforming, Inc. v. Belzoni Tractor Co., 34 So. 3d 603 (Miss. Ct. App. 2009).

§ 75-2-315. Implied warranty; fitness for particular purpose.

JUDICIAL DECISIONS

A. In General.

3. Disclaimer or exclusion.

B. Scope of Warranty.

4. In general.

C. Reliance on Seller's Skill and Judgment.

28. Knowledgeable buyer.
29. —Selection by buyer.

D. Remedies and Procedure.

41. Evidence and burden of proof.

E. Specific Goods as Fit for Particular Purpose.

60. Machinery and tools.
66. Motor vehicles and related equipment.
69. Boats and watercraft.

A. In General.

3. Disclaimer or exclusion.

Miss. Code Ann. § 75-2-315.1 is specifically excepted from the non-disclaimer statute, Miss. Code Ann. § 11-7-18; this fact, together with a plain reading of Miss. Code Ann. § 75-2-315.1 itself, makes abundantly clear that the Mississippi Legislature intends to permit the disclaimer of implied warranties in contracts for the sale of late-model used vehicles. Therefore, a buyer's act of signing an "as is" agreement when purchasing a used

vehicle was sufficient to waive these warranties. Murray v. Blackwell, 966 So. 2d 901 (Miss. Ct. App. 2007).

B. Scope of Warranty.

4. In general.

In the context of Miss. Code Ann. § 75-2-315, a caveat to the warranty of fitness for particular purpose applies when the good is merely purchased for the ordinary use of a good of that kind. Johnson v. Davidson Ladders, Inc., 403 F. Supp. 2d 544 (N.D. Miss. 2005), affirmed by 193 Fed. Appx. 349, 2006 U.S. App. LEXIS 20526 (5th Cir. Miss. 2006).

C. Reliance on Seller's Skill and Judgment.

28. Knowledgeable buyer.

29. —Selection by buyer.

Where the buyer twice refused to ride the horse, and did not attempt to assess the horse's fitness for riding through a veterinary examination, and subsequently discovered the horse was partially lame immediately upon riding the equine, combined with the seller's "as is" guarantee, the events at the point of sale negated the implied warranty of fitness for a particular purpose within the meaning of Miss. Code Ann. § 75-2-315 (Rev. 2002). Ladner v. Jordan, 848 So. 2d 870 (Miss. Ct. App. 2002).

D. Remedies and Procedure.

41. Evidence and burden of proof.

Court properly granted summary judgment on plaintiffs claim against a casket company alleging warranty for a particular purpose because plaintiffs had not identified any particular purpose to the company when the casket was selected, and there was no proof that the body had been damaged in any way by the alleged problems with the casket. Moss v. Batesville Casket Co., 935 So. 2d 393 (Miss. 2006).

E. Specific Goods as Fit for Particular Purpose.

60. Machinery and tools.

In a landscaping company's suit alleging breach of the warranty of fitness for a particular purpose as to certain tractors, it was not entitled to a judgment notwithstanding the verdict because while it presented evidence showing that the tractors did not perform as expected, the seller and manufacturer presented sufficient evidence to the contrary, including evidence that the company's principal did not rely on anyone from the seller's staff or any manufacturer's manual when he decided to purchase the equipment. Duett Landforming, Inc. v. Belzoni Tractor Co., 34 So. 3d 603 (Miss. Ct. App. 2009).

66. Motor vehicles and related equipment.

Driver's claims against a van seller and manufacturer for breach of the implied warranty of fitness for a particular purpose under Miss. Code Ann. § 75-2-315 failed because the van was used only for its ordinary purpose. Watson Quality Ford, Inc. v. Casanova, 999 So. 2d 830 (Miss. 2008).

Because there was no reliance on the manufacturer by the decedent's relatives' or the television station he worked for in the purchase of the van's telescoping mast, warranty of fitness for a particular purpose under Miss. Code Ann. § 75-2-315 did not apply. Austin v. Will-Burt Co., 232 F. Supp. 2d 682 (N.D. Miss. 2002), aff'd, 361 F.3d 862 (5th Cir. 2004).

69. Boats and watercraft.

Although an outboard motor seller could not disclaim its general warranties of merchantability and fitness for a particular purpose, the jury's determination that these had been breached was clearly erroneous where the evidence showed that the seller had assumed no special duties to the purchaser and that the purchaser had not allowed the seller to exercise its contractual right to attempt to cure. Mercury Marine v. Clear River Constr. Co., 839 So. 2d 508 (Miss. 2003).

§ 75-2-315.1. Limitation of exclusion or modification of warranties to consumers.

JUDICIAL DECISIONS

2. Construction.

Miss. Code Ann. § 75-2-315.1 is specifically excepted from the non-disclaimer statute, Miss. Code Ann. § 11-7-18; this fact, together with a plain reading of Miss. Code Ann. § 75-2-315.1 itself, makes abundantly clear that the Mississippi Legislature intends to permit the disclaimer of implied warranties in contracts for the sale of late-model used vehicles. Therefore, a buyer's act of signing an "as is" agreement when purchasing a used vehicle was sufficient to waive these warranties. Murray v. Blackwell, 966 So. 2d 901 (Miss. Ct. App. 2007).

§ 75-2-323. Form of bill of lading required in overseas shipment; "overseas."

(1) Where the contract contemplates overseas shipment and contains a term CIF or C& F or FOB vessel, the seller unless otherwise agreed must obtain a negotiable bill of lading stating that the goods have been loaded on board or, in the case of a term CIF or C& F, received for shipment.

(2) Where in a case within subsection (1) a tangible bill of lading has been issued in a set of parts, unless otherwise agreed if the documents are not to be sent from abroad the buyer may demand tender of the full set; otherwise only one (1) part of the bill of lading need be tendered. Even if the agreement expressly requires a full set:

(a) Due tender of a single part is acceptable within the provisions of this chapter on cure of improper delivery (subsection (1) of Section 75-2-508); and

(b) Even though the full set is demanded, if the documents are sent from abroad the person tendering an incomplete set may nevertheless require payment upon furnishing an indemnity which the buyer in good faith deems adequate.

(3) A shipment by water or by air or a contract contemplating such shipment is "overseas" insofar as by usage of trade or agreement it is subject to the commercial, financing or shipping practices characteristic of international deep water commerce.

SOURCES: Codes, 1942, § 41A:2-323; Laws, 1966, ch. 316, § 2-323; Laws, 2006, ch. 527, § 45, eff from and after July 1, 2006.

Amendment Notes — The 2006 amendment inserted "tangible" preceding "bill of lading" in (2); substituted "(subsection (1) of Section 75-2-508)" for "(subsection (1) of Section 2-508)" at the end of (2)(a); and made a minor stylistic change.

PART 4.

TITLE, CREDITORS AND GOOD FAITH PURCHASERS.

SEC.

75-2-401. Passing of title; reservation for security; limited application of this section.

§ 75-2-401. Passing of title; reservation for security; limited application of this section.

Each provision of this chapter with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to such title. Insofar as situations are not covered by the other provisions of this chapter and matters concerning title become material the following rules apply:

(1) Title to goods cannot pass under a contract for sale prior to their identification to the contract (Section 75-2-501), and unless otherwise explicitly agreed the buyer acquires by their identification a special property as limited by the Uniform Commercial Code. Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest. Subject to these provisions and to the provisions of the chapter on Secured Transactions (Chapter 9), title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.

(2) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading:

(a) If the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment; but

(b) If the contract requires delivery at destination, title passes on tender there.

(3) Unless otherwise explicitly agreed where delivery is to be made without moving the goods:

(a) If the seller is to deliver a tangible document of title, title passes at the time, when and the place where he delivers such documents and if the seller is to deliver an electronic document of title, title passes when the seller delivers the document; or

(b) If the goods are at the time of contracting already identified and no documents of title are to be delivered, title passes at the time and place of contracting.

(4) A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance revests

title to the goods in the seller. Such revesting occurs by operation of law and is not a "sale."

SOURCES: Codes, 1942, § 41A:2-401; Laws, 1966, ch. 316, § 2-401; Laws, 2006, ch. 527, § 46, eff from and after July 1, 2006.

Amendment Notes — The 2006 amendment substituted "(Section 75-2-501" for "(Section 2-501)" and "limited by the Uniform Commercial Code" for "limited by this code" in the first sentence in (1); rewrote (3)(a); inserted "of title" following "documents" in (3)(b); and made minor stylistic changes.

Part 5.

Performance.

Sec.

75-2-503. Manner of seller's tender of delivery.
75-2-505. Seller's shipment under reservation.
75-2-506. Rights of financing agency.
75-2-509. Risk of loss in the absence of breach.

§ 75-2-503. Manner of seller's tender of delivery.

(1) Tender of delivery requires that the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable him to take delivery. The manner, time and place for tender are determined by the agreement and this chapter, and in particular:

(a) Tender must be at a reasonable hour, and if it is of goods they must be kept available for the period reasonably necessary to enable the buyer to take possession; but

(b) Unless otherwise agreed the buyer must furnish facilities reasonably suited to the receipt of the goods.

(2) Where the case is within the Section 75-2-504 respecting shipment tender requires that seller comply with its provisions.

(3) Where the seller is required to deliver at a particular destination tender requires that he comply with subsection (1) and also in any appropriate case tender documents as described in subsections (4) and (5) of this section.

(4) Where goods are in the possession of a bailee and are to be delivered without being moved:

(a) Tender requires that the seller either tender a negotiable document of title covering such goods or procure acknowledgment by the bailee of the buyer's right to possession of the goods; but

(b) Tender to the buyer of a nonnegotiable document of title or of a record directing the bailee to deliver is sufficient tender unless the buyer seasonably objects, and except as otherwise provided in Article 9 receipt by the bailee of notification of the buyer's rights fixes those rights as against the bailee and all third persons; but risk of loss of the goods and of any failure by the bailee to honor the nonnegotiable document of title or to obey the direction remains on the seller until the buyer has had a reasonable time to

present the document or direction, and a refusal by the bailee to honor the document or to obey the direction defeats the tender.

(5) Where the contract requires the seller to deliver documents:

(a) He must tender all such documents in correct form, except as provided in this chapter with respect to bills of lading in a set (Section 75-2-323(2)); and

(b) Tender through customary banking channels is sufficient and dishonor of a draft accompanying or associated with the documents constitutes nonacceptance or rejection.

SOURCES: Codes, 1942, § 41A:2-503; Laws, 1966, ch. 316, § 2-503; Laws, 2006, ch. 527, § 47, eff from and after July 1, 2006.

Amendment Notes — The 2006 amendment deleted "the" preceding "seller comply" in (2); in (4)(b), substituted "record directing the bailee" for "written direction to the bailee" and inserted "except as otherwise provided in Article 9"; substituted "(Section 75-2-323(2))" for "(subsection (2) of Section 2-323)" in (5)(a); inserted "or associated with" following "draft accompanying" in (5)(b); and made minor stylistic changes throughout.

§ 75-2-505. Seller's shipment under reservation.

(1) Where the seller has identified goods to the contract by or before shipment:

(a) His procurement of a negotiable bill of lading to his own order or otherwise reserves in him a security interest in the goods. His procurement of the bill to the order of a financing agency or of the buyer indicates in addition only the seller's expectation of transferring that interest to the person named.

(b) A nonnegotiable bill of lading to himself or his nominee reserves possession of the goods as security but except in a case of conditional delivery (Section 75-2-507(2)) a nonnegotiable bill of lading naming the buyer as consignee reserves no security interest even though the seller retains possession or control of the bill of lading.

(2) When shipment by the seller with reservation of a security interest is in violation of the contract for sale it constitutes an improper contract for transportation within Section 75-2-504 but impairs neither the rights given to the buyer by shipment and identification of the goods to the contract nor the seller's powers as a holder of a negotiable document of title.

SOURCES: Codes, 1942, § 41A:2-505; Laws, 1966, ch. 316, § 2-505; Laws, 2006, ch. 527, § 48, eff from and after July 1, 2006.

Amendment Notes — The 2006 amendment, in (1)(b), substituted "(Section 75-2-507(2))" for "(subsection (2) of Section 2-507)" and inserted "or control" following "the seller retains possession"; and added "of title" at the end of (2).

§ 75-2-506. Rights of financing agency.

(1) A financing agency by paying or purchasing for value a draft which relates to a shipment of goods acquires to the extent of the payment or purchase and in addition to its own rights under the draft and any document of title securing it any rights of the shipper in the goods including the right to stop delivery and the shipper's right to have the draft honored by the buyer.

(2) The right to reimbursement of a financing agency which has in good faith honored or purchased the draft under commitment to or authority from the buyer is not impaired by subsequent discovery of defects with reference to any relevant document which was apparently regular.

SOURCES: Codes, 1942, § 41A:2-506; Laws, 1966, ch. 316, § 2-506; Laws, 2006, ch. 527, § 49, eff from and after July 1, 2006.

Amendment Notes — The 2006 amendment deleted "on its face" from the end of (2).

§ 75-2-508. Cure by seller of improper tender or delivery; replacement.

JUDICIAL DECISIONS

1. In general.

Although the right to cure is not explicitly mentioned in the context of a revocation of acceptance, it should have been inferred by the trial court that heard a buyer's claim that two outboard motors were deficient; the contract of sale provided procedures for taking care of defects, yet the buyer replaced the motors the day the defects became evident. Mercury Marine v. Clear River Constr. Co., 839 So. 2d 508 (Miss. 2003).

§ 75-2-509. Risk of loss in the absence of breach.

(1) Where the contract requires or authorizes the seller to ship the goods by carrier:

(a) If it does not require him to deliver them at a particular destination, the risk of loss passes to the buyer when the goods are duly delivered to the carrier even though the shipment is under reservation (Section 75-2-505); but

(b) If it does require him to deliver them at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the buyer when the goods are there duly so tendered as to enable the buyer to take delivery.

(2) Where the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the buyer:

(a) On his receipt of possession or control of a negotiable document of title covering the goods; or

(b) On acknowledgment by the bailee of the buyer's right to possession of the goods; or

(c) After his receipt of possession or control of a nonnegotiable document of title or other direction to deliver in a record, as provided in Section 75-2-503(4)(b).

(3) In any case not within subsection (1) or (2), the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery.

(4) The provisions of this section are subject to contrary agreement of the parties and to the provisions of this chapter on sale on approval (Section 75-2-327) and on effect of breach on risk of loss (Section 75-2-510).

SOURCES: Codes, 1942, § 41A:2-509; Laws, 1966, ch. 316, § 2-509; Laws, 2006, ch. 527, § 50, eff from and after July 1, 2006.

Amendment Notes — The 2006 amendment substituted "(Section 75-2-505)" for "(Section 2-505)" in (1)(a); inserted "possession or control of" in (2)(a); rewrote (2)(c); substituted "(Section 75-2-327)" for "(Section 2-327)" and "(Section 75-2-510)" for "(Section 2-510)" in (4); and made minor stylistic changes throughout.

PART 6.

BREACH, REPUDIATION AND EXCUSE.

SEC.

75-2-605. Waiver of buyer's objections by failure to particularize.

§ 75-2-605. Waiver of buyer's objections by failure to particularize.

(1) The buyer's failure to state in connection with rejection a particular defect which is ascertainable by reasonable inspection precludes him from relying on the unstated defect to justify rejection or to establish breach:

(a) Where the seller could have cured it if stated seasonably; or

(b) Between merchants when the seller has after rejection made a request in writing for a full and final written statement of all defects on which the buyer proposes to rely.

(2) Payment against documents made without reservation of rights precludes recovery of the payment for defects apparent in the documents.

SOURCES: Codes, 1942, § 41A:2-605; Laws, 1966, ch. 316, § 2-605; Laws, 2006, ch. 527, § 51, eff from and after July 1, 2006.

Amendment Notes — The 2006 amendment substituted "in" for "on the face of" following "defects apparent" in (2); and made a minor stylistic change.

§ 75-2-607. Effect of acceptance; notice of breach; burden of establishing breach after acceptance; notice of claim or litigation to person answerable over.

JUDICIAL DECISIONS

B. Buyer's Claim of Breach.

7. Persons required to give notice.
8. Sufficiency of notice.

B. Buyer's Claim of Breach.

7. Persons required to give notice.

Only a strict standard of notification of breach can be justly applied where both parties are merchants under the Uniform Commercial Code. Peavey Elecs. Corp. v. Baan U.S.A., Inc., 10 So. 3d 945 (Miss. Ct. App. 2009).

8. Sufficiency of notice.

In a case in which a buyer sued a software seller for breach of contract, the buyer failed to provide timely notice of breach, as required by Miss. Code Ann. § 75-2-607(3)(a). Issues cited in a letter from the buyer to the seller were not problems with the software, but the mere fact that the buyer had not been using some of the software it had been paying for. Peavey Elecs. Corp. v. Baan U.S.A., Inc., 10 So. 3d 945 (Miss. Ct. App. 2009).

Notice of breach of warranty was sufficient to cover a low case gas compressor in a compressor train notwithstanding the defendant's argument that notice given after the high case compressor in the compressor train broke was insufficient to provide notice with regard to the low case compressor, where (1) the plaintiff gave notice of defects in the high case compressor within the time frame contemplated by the warranty, (2) the warranty required notice of defects in the "equipment" to trigger liability under the express warranty, and the contract defined "equipment" to include both the high case and the low case compressors, and (3) the plaintiff provided evidence that the defects in the high case compressor were common to the low case compressor as well. Miss. Chem. Corp. v. Dresser-Rand Co., 287 F.3d 359 (5th Cir. 2002).

§ 75-2-608. Revocation of acceptance in whole or in part.

JUDICIAL DECISIONS

3. Alternative remedies.

Although the right to cure is not explicitly mentioned in the context of a revocation of acceptance, it should have been inferred by the trial court that heard a buyer's claim that two outboard motors were deficient; the contract of sale provided procedures for taking care of defects, yet the buyer replaced the motors the day the defects became evident. Mercury Marine v. Clear River Constr. Co., 839 So. 2d 508 (Miss. 2003).

Part 7.

Remedies.

Sec.
75-2-705. Seller's stoppage of delivery in transit or otherwise.

§ 75-2-705. Seller's stoppage of delivery in transit or otherwise.

(1) The seller may stop delivery of goods in the possession of a carrier or other bailee when he discovers the buyer to be insolvent (Section 75-2-702) and

may stop delivery of carload, truckload, planeload or larger shipments of express or freight when the buyer repudiates or fails to make a payment due before delivery or if for any other reason the seller has a right to withhold or reclaim the goods.

(2) As against such buyer the seller may stop delivery until:

(a) Receipt of the goods by the buyer; or

(b) Acknowledgment to the buyer by any bailee of the goods except a carrier that the bailee holds the goods for the buyer; or

(c) Such acknowledgment to the buyer by a carrier by reshipment or as a warehouse; or

(d) Negotiation to the buyer of any negotiable document of title covering the goods.

(3)(a) To stop delivery the seller must so notify as to enable the bailee by reasonable diligence to prevent delivery of the goods.

(b) After such notification the bailee must hold and deliver the goods according to the directions of the seller but the seller is liable to the bailee for any ensuing charges or damages.

(c) If a negotiable document of title has been issued for goods the bailee is not obliged to obey a notification to stop until surrender of the possession or control of the document.

(d) A carrier who has issued a nonnegotiable bill of lading is not obliged to obey a notification to stop received from a person other than the consignor.

SOURCES: Codes, 1942, § 41A:2-705; Laws, 1966, ch. 316, § 2-705; Laws, 2006, ch. 527, § 52, eff from and after July 1, 2006.

Amendment Notes — The 2006 amendment substituted "(Section 75-2-702)" for "(Section 2-702)" in (1); substituted "Acknowledgment to the buyer" for "acknowledgments to the buyer" in (2)(b); substituted "or as a warehouse" for "or as warehouseman" in (2)(c); inserted "of the possession or control" preceding "of the document" in (3)(c); and made a minor stylistic change.

§ 75-2-706. Seller's resale including contract for resale.

RESEARCH REFERENCES

ALR. Resale of goods under UCC § 2-706. 101 A.L.R.5th 563.

§ 75-2-708. Seller's damages for nonacceptance or repudiation.

JUDICIAL DECISIONS

3. Lost profit as damages.
5. — Particular applications.

3. Lost profit as damages.

5. — Particular applications.

Trial court erred in awarding as damages for the breach of a requirements contract to buy fill dirt an amount of money equal to the contract price of the dirt bought from a third party; since the property owners still had the dirt they were to have sold, they were entitled only to the lost profits and incidental damages. G.B. "Boots" Smith Corp. v. Cobb, 860 So. 2d 774 (Miss. 2003).

§ 75-2-715. Buyer's incidental and consequential damages.

JUDICIAL DECISIONS

5. Buyer's obligation to cover or mitigate damages.
10. Particular items and elements.
16. —Lost profits; allowed.
28. Preservation for review.

5. Buyer's obligation to cover or mitigate damages.

Damages claims by a customer of a gas compressor designer related to warranty could not reasonably have been prevented by cover; as a consequence, the court did not err in failing to instruct the jury on the issue of mitigation of damages. Miss. Chem. Corp. v. Dresser-Rand Co., — F. Supp. 2d —, 2000 U.S. Dist. LEXIS 21965 (S.D. Miss. Sept. 12, 2000), affirmed by 287 F.3d 359, 2002 U.S. App. LEXIS 5305, CCH Prod. Liab. Rep. P16308, 47 U.C.C. Rep. Serv. 2d (CBC) 244, 58 Fed. R. Evid. Serv. (CBC) 1087 (5th Cir. Miss. 2002).

10. Particular items and elements.

16. —Lost profits; allowed.

Lost profits were properly awarded to the plaintiff where the defendant knew that if the compressor train that it manufactured for the plaintiff malfunctioned, the plaintiff's ammonia plant would have to be shut down and that ammonia was necessary for the production of the plaintiff's products, and damages were not limited to the value of the substitute ammonia the plaintiff secured to replace the diminished production by the compressor train. Miss. Chem. Corp. v. Dresser-Rand Co., 287 F.3d 359 (5th Cir. 2002).

28. Preservation for review.

Grant of summary judgment in favor of a window manufacturer and seller in the homeowners' action against them concerning leaking windows was appropriate because the homeowners' warranty claims were procedurally barred. The homeowners never, over the course of filing three complaints, pleaded claims for breach of implied or express warranty against the seller and that critical fact fundamentally distinguished the case from the warranty decisions relied upon by the homeowners. McKee v. Bowers Window & Door Co., 64 So. 3d 926 (Miss. 2011).

§ 75-2-718. Liquidation or limitation of damages; deposits.

JUDICIAL DECISIONS

1. In general.
2. Liquidated damages.

1. In general.

In interpreting Miss. Code Ann. § 75-2-718(1) and its application to the agreement now in dispute, the court sat in the same position as if it were the trial court. Thomas v. Scarborough, 977 So. 2d 393 (Miss. Ct. App. 2007), writ of certiorari denied by 977 So. 2d 343, 2008 Miss. LEXIS 71 (Miss. 2008).

Chancery court misapplied Miss. Code Ann. § 75-2-718 in a breach of a land-sale contract dispute; the proper measure of damages was whether the profit realized was comparable to the profit the seller would have made had the buyers not breached the agreement. Thomas v. Scarborough, — So. 2d —, 2006 Miss. App. LEXIS 849 (Miss. Ct. App. Nov. 14, 2006), opinion withdrawn by, substituted opinion at 977 So. 2d 393, 2007 Miss. App. LEXIS 800, 66 U.C.C. Rep. Serv. 2d (CBC) 360 (Miss. Ct. App. 2007).

2. Liquidated damages.

Because a lessor did not suffer any actual damages in light of lessees' breach of a lease purchase agreement, but instead the lessor made a profit over and above the $ 30,000 downpayment by the lessees, the $ 30,000 forfeiture was void as a penalty, for purposes of Miss. Code Ann. § 75-2-718(1). Thomas v. Scarborough, 977 So. 2d 393 (Miss. Ct. App. 2007), writ of certiorari denied by 977 So. 2d 343, 2008 Miss. LEXIS 71 (Miss. 2008).

Chancellor was asked only to find whether an agreement was clear and whether forfeiture of the payments constituted unconscionabe and unreasonably large liquidated damages, for purposes of Miss. Code Ann. § 75-2-718(1), and the court found that the lower court committed no procedural error in adopting almost verbatim the lessees' proposed findings of fact and conclusions of law. Thomas v. Scarborough, 977 So. 2d 393 (Miss. Ct. App. 2007), writ of certiorari denied by 977 So. 2d 343, 2008 Miss. LEXIS 71 (Miss. 2008).

In a dispute over the sale of property, actual damages did not have to be shown in order to recover the earnest money as liquidated damages because an amount equal to 6.5% of the purchase price was not unreasonable under Miss. Code Ann. § 75-2-718. Culbreath Revocable Trust v. Sanders, 979 So. 2d 704 (Miss. Ct. App. 2007), writ of certiorari denied by 979 So. 2d 691, 2008 Miss. LEXIS 162 (Miss. 2008).

§ 75-2-719. Contractual modification or limitation of remedy.

JUDICIAL DECISIONS

3. Exclusivity of remedy.
6. —Repair or replacement.
26. Warranties.

3. Exclusivity of remedy.

6. —Repair or replacement.

Repair or replacement warranty of two outboard motors could not be said to have failed of its essential purpose when there were only two incidences of engine failure at sea, 10 months apart, and each event involved a failure of a different part. Mercury Marine v. Clear River Constr. Co., 839 So. 2d 508 (Miss. 2003).

26. Warranties.

Miss. Code Ann. § 75-2-315.1 is specifically excepted from the non-disclaimer statute, Miss. Code Ann. § 11-7-18; this fact, together with a plain reading of Miss. Code Ann. § 75-2-315.1 itself, makes abundantly clear that the Mississippi Legislature intends to permit the disclaimer of implied warranties in contracts for the sale of late-model used vehicles. Therefore, a buyer's act of signing an "as is" agreement when purchasing a used vehicle was sufficient to waive these war-

ranties. Murray v. Blackwell, 966 So. 2d 901 (Miss. Ct. App. 2007).

§ 75-2-725. Statute of limitations in contracts for sale.

JUDICIAL DECISIONS

15. When statute begins to run.
17. —Date of sale or delivery.
18. Explicit extension of warranty to future performance.
21. Timeliness of institution of particular actions.
22. —Breach of warranty.

15. When statute begins to run.

17. —Date of sale or delivery.

Car owners' claim for breach of warranty against the car's manufacturer arising out of allegedly defective air bags was barred by the six-year statute of limitations, Miss. Code Ann. § 75-2-725, which began to run from the date of delivery of the car regardless of the owners' awareness of the breach. Forbes v. GMC, 993 So. 2d 822 (Miss. 2008).

18. Explicit extension of warranty to future performance.

Car owners' claim for breach of warranty against the car's manufacturer arising out of defective air bags was barred by the six-year statute of limitations, Miss. Code Ann. § 75-2-725. The explicit future perfomance exception of subsection (2) did not apply because the owner's manual did not provide an explicit guarantee of performance of the air bags. Forbes v. GMC, 993 So. 2d 822 (Miss. 2008).

21. Timeliness of institution of particular actions.

22. —Breach of warranty.

Where the consumer complained that the vehicle-equipped air bag failed to deploy during a car accident, the consumer's 2001 breach of warranty claim arising from a warranty on a 1995 vehicle was barred by the six-year statute of limitations set forth in Miss. Code Ann. § 75-2-725. Brown v. GMC, 4 So. 3d 400 (Miss. Ct. App. 2009).

The plaintiff's cause of action based on express warranty did not accrue for the purpose of the statute until 1992, when the defendant's promise to repair or replace a compressor train failed its essential purpose where (1) a part of the compressor train failed in 1990 and the defendant immediately repaired and replaced it, (2) the compressor train then functioned normally until December 1992, when another part began to malfunction and caused the train to run at a diminished rate. Miss. Chem. Corp. v. Dresser-Rand Co., 287 F.3d 359 (5th Cir. 2002).

CHAPTER 2A

Uniform Commercial Code — Leases

Part 1. General Provisions.....75-2A-101
Part 2. Formation and Construction of Lease Contract.....75-2A-201
Part 5. Default.....75-2A-501

Part 1.

General Provisions.

Sec.
75-2A-103. Definitions and index of definitions.

§ 75-2A-103. Definitions and index of definitions.

(1) In this chapter unless the context otherwise requires:

(a) "Buyer in ordinary course of business" means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest or leasehold interest of a third party in the goods, buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker. "Buying" may be for cash or by exchange of other property or on secured or unsecured credit and includes acquiring goods or documents of title under a preexisting contract for sale but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

(b) "Cancellation" occurs when either party puts an end to the lease contract for default by the other party.

(c) "Commercial unit" means such a unit of goods as by commercial usage is a single whole for purposes of lease and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article, as a machine, or a set of articles, as a suite of furniture or a line of machinery, or a quantity, as a gross or carload, or any other unit treated in use or in the relevant market as a single whole.

(d) "Conforming" goods or performance under a lease contract means goods or performance that are in accordance with the obligations under the lease contract.

(e) "Consumer lease" means a lease that a lessor regularly engaged in the business of leasing or selling makes to a lessee who is an individual and who takes under the lease primarily for a personal, family or household purpose, if the total payments to be made under the lease contract, excluding payments for options to renew or buy, do not exceed Twenty-five Thousand Dollars ($25,000.00).

(f) "Fault" means wrongful act, omission, breach or default.

(g) "Finance lease" means a lease with respect to which:

(i) The lessor does not select, manufacture, or supply the goods;

(ii) The lessor acquires the goods or the right to possession and use of the goods in connection with the lease; and

(iii) One (1) of the following occurs:

(A) The lessee receives a copy of the contract by which the lessor acquired the goods or the right to possession and use of the goods before signing the lease contract;

(B) The lessee's approval of the contract by which the lessor acquired the goods or the right to possession and use of the goods is a condition to effectiveness of the lease contract;

(C) The lessee, before signing the lease contract, receives an accurate and complete statement designating the promises and warranties, and any disclaimers of warranties, limitations or modifications of remedies, or liquidated damages, including those of a third party, such as the manufacturer of the goods, provided to the lessor by the person supplying the goods in connection with or as part of the contract by which the lessor acquired the goods or the right to possession and use of the goods; or

(D) If the lease is not a consumer lease, the lessor, before the lessee signs the lease contract, informs the lessee in writing (a) of the identity of the person supplying the goods to the lessor, unless the lessee has selected that person and directed the lessor to acquire the goods or the right to possession and use of the goods from that person, (b) that the lessee is entitled under this chapter to the promises and warranties, including those of any third party, provided to the lessor by the person supplying the goods in connection with or as part of the contract by which the lessor acquired the goods or the right to possession and use of the goods, and (c) that the lessee may communicate with the person supplying the goods to the lessor and receive an accurate and complete statement of those promises and warranties, including any disclaimers and limitations of them or of remedies.

(h) "Goods" means all things that are movable at the time of identification to the lease contract, or are fixtures (Section 75-2A-309), but the term does not include money, documents, instruments, accounts, chattel paper, general intangibles or minerals or the like, including oil and gas, before extraction. The term also includes the unborn young of animals.

(i) "Installment lease contract" means a lease contract that authorizes or requires the delivery of goods in separate lots to be separately accepted, even though the lease contract contains a clause "each delivery is a separate lease" or its equivalent.

(j) "Lease" means a transfer of the right to possession and use of goods for a term in return for consideration, but a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.

(k) "Lease agreement" means the bargain, with respect to the lease, of the lessor and the lessee in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this chapter. Unless the context clearly indicates otherwise, the term includes a sublease agreement.

(*l*) "Lease contract" means the total legal obligation that results from the lease agreement as affected by this chapter and any other applicable rules of law. Unless the context clearly indicates otherwise, the term includes a sublease contract.

(m) "Leasehold interest" means the interest of the lessor or the lessee under a lease contract.

(n) "Lessee" means a person who acquires the right to possession and use of goods under a lease. Unless the context clearly indicates otherwise, the term includes a sublease.

(o) "Lessee in ordinary course of business" means a person who in good faith and without knowledge that the lease to him is in violation of the ownership rights or security interest or leasehold interest of a third party in the goods leases in ordinary course from a person in the business of selling or leasing goods of that kind but does not include a pawnbroker. "Leasing"

may be for cash or by exchange of other property or on secured or unsecured credit and includes acquiring goods or documents of title under a preexisting lease contract but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

(p) "Lessor" means a person who transfers the right to possession and use of goods under a lease. Unless the context clearly indicates otherwise, the term includes a sublessor.

(q) "Lessor's residual interest" means the lessor's interest in the goods after expiration, termination or cancellation of the lease contract.

(r) "Lien" means a charge against or interest in goods to secure payment of a debt or performance of an obligation, but the term does not include a security interest.

(s) "Lot" means a parcel or a single article that is the subject matter of a separate lease or delivery, whether or not it is sufficient to perform the lease contract.

(t) "Merchant lessee" means a lessee that is a merchant with respect to goods of the kind subject to the lease.

(u) "Present value" means the amount as of a date certain of one or more sums payable in the future, discounted to the date certain. The discount is determined by the interest rate specified by the parties if the rate was not manifestly unreasonable at the time the transaction was entered into; otherwise, the discount is determined by a commercially reasonable rate that takes into account the facts and circumstances of each case at the time the transaction was entered into.

(v) "Purchase" includes taking by sale, lease, mortgage, security interest, pledge, gift or any other voluntary transaction creating an interest in goods.

(w) "Sublease" means a lease of goods the right to possession and use of which was acquired by the lessor as a lessee under an existing lease.

(x) "Supplier" means a person from whom a lessor buys or leases goods to be leased under a finance lease.

(y) "Supply contract" means a contract under which a lessor buys or leases goods to be leased.

(z) "Termination" occurs when either party pursuant to a power created by agreement or law puts an end to the lease contract otherwise than for default.

(2) Other definitions applying to this chapter and the sections in which they appear are:

"Accessions"	Section 75-2A-310(1)
"Construction mortgage"	Section 75-2A-309(1)(d)
"Encumbrance"	Section 75-2A-309(1)(e)
"Fixtures"	Section 75-2A-309(1)(a)
"Fixture filing"	Section 75-2A-309(1)(b)
"Purchase money lease"	Section 75-2A-309(1)(c)

(3) The following definitions in other chapters apply to this chapter:

"Account"	Section 75-9-102(a)(2)

"Between merchants"	Section 75-2-104(3)
"Buyer"	Section 75-2-103(1)(a)
"Chattel paper"	Section 75-9-102(a)(11)
"Consumer goods"	Section 75-9-102(a)(23)
"Document"	Section 75-9-102(a)(30)
"Entrusting"	Section 75-2-403(3)
"General intangible"	Section 75-9-102(a)(42)
"Instrument"	Section 75-9-102(a)(47)
"Merchant"	Section 75-2-104(1)
"Mortgage"	Section 75-9-102(a)(55)
"Pursuant to commitment"	Section 75-9-102(a)(68)
"Receipt"	Section 75-2-103(1)(c)
"Sale"	Section 75-2-106(1)
"Sale on approval"	Section 75-2-326
"Sale or return"	Section 75-2-326
"Seller"	Section 75-2-103(1)(d)

(4) In addition, Chapter 1 contains general definitions and principles of construction and interpretation applicable throughout this chapter.

SOURCES: Laws, 1994, ch. 445, § 1; Laws, 2001, ch. 495, § 11; Laws, 2006, ch. 527, § 53; Laws, 2010, ch. 506, § 7, eff from and after July 1, 2010.

Amendment Notes — The 2006 amendment substituted "acquiring goods or documents of title" for "receiving goods or documents of title" in (1)(a) and (1)(o).

The 2010 amendment deleted the entry for "Good faith" following "General intangible" in (3).

Part 2.

Formation and Construction of Lease Contract.

Sec.
75-2A-207. Repealed.

§ 75-2A-201. Statute of frauds.

RESEARCH REFERENCES

ALR. Sufficiency of description of terms and conditions of lease, or lease provision, so as to comply with statute of frauds. 12 A.L.R.6th 123.

§ 75-2A-207. Repealed.

Repealed by Laws of 2010, ch. 506, § 46, effective from and after July 1, 2010.

§ 75-2A-207. [Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.]

Editor's Note — Former § 75-2A-207 provided for the practical construction of "course of performance" for purposes of the UCC Article 2A-Leases. For present similar

provisions, see § 75-1-303, which integrates the course of performance concept from this section and § 75-2-208 into the principles of former § 75-1-205.

PART 5.

DEFAULT.

Article A. In General 75-2A-501
Article B. Default by Lessor 75-2A-508
Article C. Default by Lessee 75-2A-523

ARTICLE A.

IN GENERAL.

SEC.
75-2A-501. Default: procedure.

§ 75-2A-501. Default: procedure.

(1) Whether the lessor or the lessee is in default under a lease contract is determined by the lease agreement and this chapter.

(2) If the lessor or the lessee is in default under the lease contract, the party seeking enforcement has rights and remedies as provided in this chapter and, except as limited by this chapter, as provided in the lease agreement.

(3) If the lessor or the lessee is in default under the lease contract, the party seeking enforcement may reduce the party's claim to judgment, or otherwise enforce the lease contract by self-help or any available judicial procedure or nonjudicial procedure, including administrative proceeding, arbitration, or the like, in accordance with this chapter.

(4) Except as otherwise provided in Section 75-1-305(a) or this chapter or the lease agreement, the rights and remedies referred to in subsections (2) and (3) are cumulative.

(5) If the lease agreement covers both real property and goods, the party seeking enforcement may proceed under this part as to the goods, or under other applicable law as to both the real property and the goods in accordance with that party's rights and remedies in respect of the real property, in which case this part does not apply.

SOURCES: Laws, 1994, ch. 445, § 1; Laws, 2010, ch. 506, § 8, eff from and after July 1, 2010.

Amendment Notes — The 2010 amendment substituted "Section 75-1-305(a)" for "Section 75-1-106(1)" in (4).

ARTICLE B.

DEFAULT BY LESSOR.

SEC.
75-2A-514. Waiver of lessee's objections.

75-2A-518. Cover; substitute goods.
75-2A-519. Lessee's damages for nondelivery, repudiation, default and breach of warranty in regard to accepted goods.

§ 75-2A-514. Waiver of lessee's objections.

(1) In rejecting goods, a lessee's failure to state a particular defect that is ascertainable by reasonable inspection precludes the lessee from relying on the defect to justify rejection or to establish default:

(a) If, stated seasonably, the lessor or the supplier could have cured it (Section 75-2A-513); or

(b) Between merchants if the lessor or the supplier after rejection has made a request in writing for a full and final written statement of all defects on which the lessee proposes to rely.

(2) A lessee's failure to reserve rights when paying rent or other consideration against documents precludes recovery of the payment for defects apparent in the documents.

SOURCES: Laws, 1994, ch. 445, § 1; Laws, 2006, ch. 527, § 54, eff from and after July 1, 2006.

Amendment Notes — The 2006 amendment substituted "in" for "on the face of" near the end of (2).

§ 75-2A-518. Cover; substitute goods.

(1) After a default by a lessor under the lease contract of the type described in Section 75-2A-508(1), or, if agreed, after other default by the lessor, the lessee may cover by making any purchase or lease of or contract to purchase or lease goods in substitution for those due from the lessor.

(2) Except as otherwise provided with respect to damages liquidated in the lease agreement (Section 75-2A-504) or otherwise determined pursuant to agreement of the parties (Sections 75-1-302 and 75-2A-503), if a lessee's cover is by a lease agreement substantially similar to the original lease agreement and the new lease agreement is made in good faith and in a commercially reasonable manner, the lessee may recover from the lessor as damages (i) the present value, as of the date of the commencement of the term of the new lease agreement, of the rent under the new lease agreement applicable to that period of the new lease term which is comparable to the then remaining term of the original lease agreement minus the present value as of the same date of the total rent for the then remaining lease term of the original lease agreement, and (ii) any incidental or consequential damages, less expenses saved in consequence of the lessor's default.

(3) If a lessee's cover is by lease agreement that for any reason does not qualify for treatment under subsection (2), or is by purchase or otherwise, the lessee may recover from the lessor as if the lessee had elected not to cover and Section 75-2A-519 governs.

SOURCES: Laws, 1994, ch. 445, § 1; Laws, 2010, ch. 506, § 9, eff from and after July 1, 2010.

Amendment Notes — The 2010 amendment substituted "(Sections 75-1-302 and 75-2A-503)" for "(Sections 75-1-102(3) and 75-2A-503)" in (2).

§ 75-2A-519. Lessee's damages for nondelivery, repudiation, default and breach of warranty in regard to accepted goods.

(1) Except as otherwise provided with respect to damages liquidated in the lease agreement (Section 75-2A-504) or otherwise determined pursuant to agreement of the parties (Sections 75-1-302 and 75-2A-503), if a lessee elects not to cover or a lessee elects to cover and the cover is by lease agreement that for any reason does not qualify for treatment under Section 75-2A-518(2), or is by purchase or otherwise, the measure of damages for nondelivery or repudiation by the lessor or for rejection or revocation of acceptance by the lessee is the present value, as of the date of the default, of the then market rent minus the present value as of the same date of the original rent, computed for the remaining lease term of the original lease agreement, together with incidental and consequential damages, less expenses saved in consequence of the lessor's default.

(2) Market rent is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival.

(3) Except as otherwise agreed, if the lessee has accepted goods and given notification (Section 75-2A-516(3)), the measure of damages for nonconforming tender or delivery or other default by a lessor is the loss resulting in the ordinary course of events from the lessor's default as determined in any manner that is reasonable together with incidental and consequential damages, less expenses saved in consequence of the lessor's default.

(4) Except as otherwise agreed, the measure of damages for breach of warranty is the present value at the time and place of acceptance of the difference between the value of the use of the goods accepted and the value if they had been as warranted for the lease term, unless special circumstances show proximate damages of a different amount, together with incidental and consequential damages, less expenses saved in consequence of the lessor's default or breach of warranty.

SOURCES: Laws, 1994, ch. 445, § 1; Laws, 2010, ch. 506, § 10, eff from and after July 1, 2010.

Amendment Notes — The 2010 amendment substituted "(Sections 75-1-302 and 75-2A-503)" for "(Sections 75-1-102(3) and 75-2A-503)" in (1).

ARTICLE C.

DEFAULT BY LESSEE.

SEC.

75-2A-526. Lessor's stoppage of delivery in transit or otherwise.

75-2A-527. Lessor's rights to dispose of goods.
75-2A-528. Lessor's damages for nonacceptance, failure to pay, repudiation or other default.

§ 75-2A-526. Lessor's stoppage of delivery in transit or otherwise.

(1) A lessor may stop delivery of goods in the possession of a carrier or other bailee if the lessor discovers the lessee to be insolvent and may stop delivery of carload, truckload, planeload, or larger shipments of express or freight if the lessee repudiates or fails to make a payment due before delivery, whether for rent, security or otherwise under the lease contract, or for any other reason the lessor has a right to withhold or take possession of the goods.

(2) In pursuing its remedies under subsection (1), the lessor may stop delivery until

(a) Receipt of the goods by the lessee;

(b) Acknowledgment to the lessee by any bailee of the goods, except a carrier, that the bailee hold the goods for the lessee; or

(c) Such an acknowledgement to the lessee by a carrier via reshipment or as a warehouse.

(3)(a) To stop delivery, a lessor shall so notify as to enable the bailee by reasonable diligence to prevent delivery of the goods.

(b) After notification, the bailee shall hold and deliver the goods according to the directions of the lessor, but the lessor is liable to the bailee for any ensuing charges or damages.

(c) A carrier who has issued a nonnegotiable bill of lading is not obliged to obey a notification to stop received from a person other than the consignor.

SOURCES: Laws, 1994, ch. 445, § 1; Laws, 2006, ch. 527, § 55, eff from and after July 1, 2006.

Amendment Notes — The 2006 amendment substituted "or as a warehouse" for "or as warehouseman" at the end of (2)(c).

§ 75-2A-527. Lessor's rights to dispose of goods.

(1) After a default by a lessee under the lease contract of the type described in Section 75-2A-523(1) or 75-2A-523(3)(a) or after the lessor refuses to deliver or takes possession of goods (Section 75-2A-525 or 75-2A-526), or, if agreed, after other default by a lessee, the lessor may dispose of the goods concerned or the undelivered balance thereof by lease, sale or otherwise.

(2) Except as otherwise provided with respect to damages liquidated in the lease agreement (Section 75-2A-504) or otherwise determined pursuant to agreement of the parties (Sections 75-1-302 and 75-2A-503), if the disposition is by lease agreement substantially similar to the original lease agreement and the new lease agreement is made in good faith and in a commercially reasonable manner, the lessor may recover from the lessee as damages (i) accrued and unpaid rent as of the date of the commencement of the term of the

new lease agreement, (ii) the present value, as of the same date, of the total rent for the then remaining lease term of the original lease agreement minus the present value, as of the same date, of the rent under the new lease agreement applicable to that period of the new lease term which is comparable to the then remaining term of the original lease agreement, and (iii) any incidental damages allowed under Section 75-2A-530, less expenses saved in consequence of the lessee's default.

(3) If the lessor's disposition is by lease agreement that for any reason does not qualify for treatment under subsection (2), or is by sale or otherwise, the lessor may recover from the lessee as if the lessor had elected not to dispose of the goods and Section 75-2A-528 governs.

(4) A subsequent buyer or lessee who buys or leases from the lessor in good faith for value as a result of a disposition under this section takes the goods free of the original lease contract and any rights of the original lessee even though the lessor fails to comply with one or more of the requirements of this chapter.

(5) The lessor is not accountable to the lessee for any profit made on any disposition. A lessee who has rightfully rejected or justifiably revoked acceptance shall account to the lessor for any excess over the amount of the lessee's security interest (Section 75-2A-508(5)).

SOURCES: Laws, 1994, ch. 445, § 1; Laws, 2010, ch. 506, § 11, eff from and after July 1, 2010.

Amendment Notes — The 2010 amendment substituted "(Sections 75-1-302 and 75-2A-503)" for "(Sections 75-1-102(3) and 75-2A-503)" in (2).

§ 75-2A-528. Lessor's damages for nonacceptance, failure to pay, repudiation or other default.

(1) Except as otherwise provided with respect to damages liquidated in the lease agreement (Section 75-2A-504) or otherwise determined pursuant to agreement of the parties (Sections 75-1-302 and 75-2A-503), if a lessor elects to retain the goods or a lessor elects to dispose of the goods and the disposition is by lease agreement that for any reason does not qualify for treatment under Section 75-2A-527(2), or is by sale or otherwise, the lessor may recover from the lessee as damages for a default of the type described in Section 75-2A-523(1) or 75-2A-523(3)(a), or, if agreed, for other default of the lessee, (i) accrued and unpaid rent as of the date of default if the lessee has never taken possession of the goods, or, if the lessee has taken possession of the goods, as of the date the lessor repossesses the goods or an earlier date on which the lessee makes a tender of the goods to the lessor, (ii) the present value as of the date determined under clause (i) of the total rent for the then remaining lease term of the original lease agreement minus the present value as of the same date of the market rent at the place where the goods are located computed for the same lease term, and (iii) any incidental damages allowed under Section 75-2A-530, less expenses saved in consequence of the lessee's default.

(2) If the measure of damages provided in subsection (1) is inadequate to put a lessor in as good a position as performance would have, the measure of damages is the present value of the profit, including reasonable overhead, the lessor would have made from full performance by the lessee, together with any incidental damages allowed under Section 75-2A-530, due allowance for costs reasonably incurred and due credit for payments or proceeds of disposition.

SOURCES: Laws, 1994, ch. 445, § 1; Laws, 2010, ch. 506, § 12, eff from and after July 1, 2010.

Amendment Notes — The 2010 amendment substituted "(Sections 75-1-302 and 75-2A-503)" for "(Sections 75-1-102(3) and 75-2A-503)" in (1).

CHAPTER 3

Uniform Commercial Code — Negotiable Instruments

Part 1. General Provisions and Definitions.....75-3-101
Part 3. Enforcement of Instruments.....75-3-301
Part 4. Liability of Parties.....75-3-401
Part 6. Discharge and payment.....75-3-601

Part 1.

General Provisions and Definitions.

Sec.
75-3-103. Definitions.
75-3-106. Unconditional promise or order.
75-3-116. Joint and several liability; contribution.
75-3-119. Notice of right to defend action.

§ 75-3-102. Subject matter.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1. Applicability.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1. Applicability.

Even though the provisions of the Uniform Commercial Code did not apply to a non-negotiable certificate of deposit (CD), Miss. Code Ann. § 75-3-113(a) provided persuasive authority in the determination that the backdating of the CD was appropriate; the backdating instructions here did not affect the date of the actual issuance of the CD. DeJean v. DeJean, 982 So. 2d 443 (Miss. Ct. App. 2007), writ of certiorari denied by 981 So. 2d 298, 2008 Miss. LEXIS 236 (Miss. 2008).

§ 75-3-103. Definitions.

(a) In this chapter:

(1) "Acceptor" means a drawee who has accepted a draft.

(2) [Reserved]

(3) [Reserved]

(4) "Drawee" means a person ordered in a draft to make payment.

(5) "Drawer" means a person who signs or is identified in a draft as a person ordering payment.

(6) [Reserved]

(7) "Maker" means a person who signs or is identified in a note as a person undertaking to pay.

(8) "Order" means a written instruction to pay money signed by the person giving the instruction. The instruction may be addressed to any person, including the person giving the instruction, or to one or more persons jointly or in the alternative but not in succession. An authorization to pay is not an order unless the person authorized to pay is also instructed to pay.

(9) "Ordinary care" in the case of a person engaged in business means observance of reasonable commercial standards, prevailing in the area in which the person is located, with respect to the business in which the person is engaged. In the case of a bank that takes an instrument for processing for collection or payment by automated means, reasonable commercial standards do not require the bank to examine the instrument if the failure to examine does not violate the bank's prescribed procedures and the bank's procedures do not vary unreasonably from general banking usage not disapproved by this chapter or Chapter 4.

(10) "Party" means a party to an instrument.

(11) "Principal obligor," with respect to an instrument, means the accommodated party or any other party to the instrument against whom a secondary obligor has recourse under this article.

(12) "Promise" means a written undertaking to pay money signed by the person undertaking to pay. An acknowledgment of an obligation by the obligor is not a promise unless the obligor also undertakes to pay the obligation.

(13) "Prove" with respect to a fact means to meet the burden of establishing the fact (Section 75-1-201(8), Mississippi Code of 1972).

(14) [Reserved]

(15) "Remitter" means a person who purchases an instrument from its issuer if the instrument is payable to an identified person other than the purchaser.

(16) "Remotely created check" means a check that is not created by the paying bank and that does not bear a signature applied, or purported to be applied, by the person on whose account the check is drawn.

(17) "Secondary obligor," with respect to an instrument, means (i) an indorser or an accommodation party, (ii) a drawer having the obligation described in Section 75-3-414(d), or (iii) any other party to the instrument that has recourse against another party to the instrument pursuant to Section 75-3-116(b).

(b) Other definitions applying to this chapter and the sections in which they appear are:

"Acceptance" Section 75-3-409

"Accommodated party"	Section 75-3-419
"Accommodation party"	Section 75-3-419
"Account"	Section 75-4-104
"Alteration"	Section 75-3-407
"Anomalous indorsement"	Section 75-3-205
"Blank indorsement"	Section 75-3-205
"Cashier's check"	Section 75-3-104
"Certificate of deposit"	Section 75-3-104
"Certified check"	Section 75-3-409
"Check"	Section 75-3-104
"Consideration"	Section 75-3-303
"Draft"	Section 75-3-104
"Holder in due course"	Section 75-3-302
"Incomplete instrument"	Section 75-3-115
"Indorsement"	Section 75-3-204
"Indorser"	Section 75-3-204
"Instrument"	Section 75-3-104
"Issue"	Section 75-3-105
"Issuer"	Section 75-3-105
"Negotiable instrument"	Section 75-3-104
"Negotiation"	Section 75-3-201
"Note"	Section 75-3-104
"Payable at a definite time"	Section 75-3-108
"Payable on demand"	Section 75-3-108
"Payable to bearer"	Section 75-3-109
"Payable to order"	Section 75-3-109
"Payment"	Section 75-3-602
"Person entitled to enforce"	Section 75-3-301
"Presentment" Section 75-3-501	
"Reacquisition"	Section 75-3-207
"Special indorsement"	Section 75-3-205
"Teller's check"	Section 75-3-104
"Transfer of instrument"	Section 75-3-203
"Traveler's check"	Section 75-3-104
"Value"	Section 75-3-303

(c) The following definitions in other chapters apply to this chapter:

"Banking day"	Section 75-4-104
"Clearinghouse"	Section 75-4-104
"Collecting bank"	Section 75-4-105
"Depositary bank"	Section 75-4-105
"Documentary draft"	Section 75-4-104
"Intermediary bank"	Section 75-4-105
"Item"	Section 75-4-104
"Payor bank"	Section 75-4-105
"Suspends payments"	Section 75-4-104

(d) In addition, Chapter 1 contains general definitions and principles of construction and interpretation applicable throughout this chapter.

SOURCES: Former § 75-3-103: Codes, 1942, § 41A:3-103; Laws, 1966, ch. 316, § 3-103; Laws, 1992, ch. 420, § 3; Laws, 2010, ch. 506, § 13, eff from and after July 1, 2010.

Amendment Notes — The 2010 amendment in (a), added reserve lines at (2) and (3), substituted "[Reserved]" for the definition of "Good faith" in (4), added (11), (14), (16) and (17), and redesignated the other paragraphs accordingly; in (b), added the entry for "Account"; and in (c), deleted "Bank Section 75-4-105" preceding "Banking day.".

§ 75-3-104. Negotiable instrument.

Cross References — Nonnegotiable promissory note, as defined in § 15-1-81, and "note," as defined in this section to have statutes of limitations, see § 15-1-81.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1. "Promise."
2. Negotiable instrument.
3. Certificate of deposit.

II. DECISIONS UNDER FORMER UCC § 75-3-104.

14. Check.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1. "Promise."

Because a promise is a note under Title 75, Chapter 3, of the Mississippi Code Annotated, the reference in Miss. Code Ann. § 75-3-118(a) to "a note payable at a definite time" is to a promise payable at a definite time, in other words, a promissory note. Jordan v. BancorpSouth Bank, 964 So. 2d 1205 (Miss. Ct. App. 2007).

2. Negotiable instrument.

Promissory notes were not negotiable instruments and, thus, not subject to a six-year statute of limitations, where they did not contain the language "payable to the order of" or were not made payable to an identified payee or order. Whitaker v. Limeco Corp., 32 So. 3d 429 (Miss. 2010).

Recap statements prepared by lender did not satisfy the definition of a negotiable instrument because first, there was no written document that contained an unconditional promise by the borrowers to pay him; second, with the exception of the checks written by the lender to either one of the borrower's or her husband's furniture company, none of the documents that the lender alleged to comprise a written demand note contained the words "payable to bearer" or "payable to order." Lacking these things, the lender's claims were not claims upon negotiable instruments so as to be governed by the Uniform Commercial Code and covered under the six-year statute of limitations pursuant to Miss. Code Ann. § 75-3-118(b). Morgan v. Stevens, 989 So. 2d 482 (Miss. Ct. App. 2008).

3. Certificate of deposit.

Even though the provisions of the Uniform Commercial Code did not apply to a non-negotiable certificate of deposit (CD), Miss. Code Ann. § 75-3-113(a) provided persuasive authority in the determination that the backdating of the CD was appropriate; the backdating instructions here did not affect the date of the actual issuance of the CD. DeJean v. DeJean, 982 So. 2d 443 (Miss. Ct. App. 2007), writ of certiorari denied by 981 So. 2d 298, 2008 Miss. LEXIS 236 (Miss. 2008).

II. DECISIONS UNDER FORMER UCC § 75-3-104.

14. Check.

Where defendant gave a check to plaintiff to present to a bank for repayment of a

loan, the instrument met the definition of a check in Miss. Code Ann. § 75-3-104. Bryan v. Aron, 941 So. 2d 831 (Miss. Ct. App. 2006), writ of certiorari denied en banc, sub nomine Russell v. Aron, 942 So. 2d 164, 2006 Miss. LEXIS 648 (Miss. 2006).

§ 75-3-106. Unconditional promise or order.

(a) Except as provided in this section, for the purposes of Section 75-3-104(a), a promise or order is unconditional unless it states (i) an express condition to payment, (ii) that the promise or order is subject to or governed by another record, or (iii) that rights or obligations with respect to the promise or order are stated in another record. A reference to another record does not of itself make the promise or order conditional.

(b) A promise or order is not made conditional (i) by a reference to another record for a statement of rights with respect to collateral, prepayment, or acceleration, or (ii) because payment is limited to resort to a particular fund or source.

(c) If a promise or order requires, as a condition to payment, a countersignature by a person whose specimen signature appears on the promise or order, the condition does not make the promise or order conditional for the purposes of Section 75-3-104(a). If the person whose specimen signature appears on an instrument fails to countersign the instrument, the failure to countersign is a defense to the obligation of the issuer, but the failure does not prevent a transferee of the instrument from becoming a holder of the instrument.

(d) If a promise or order at the time it is issued or first comes into possession of a holder contains a statement, required by applicable statutory or administrative law, to the effect that the rights of a holder or transferee are subject to claims or defenses that the issuer could assert against the original payee, the promise or order is not thereby made conditional for the purposes of Section 75-3-104(a); but if the promise or order is an instrument, there cannot be a holder in due course of the instrument.

SOURCES: Former § 75-3-106: Codes, 1942, § 41A:3-106; Laws, 1966, ch. 316, § 3-106; Laws, 1988, ch. 333; Laws, 1992, ch. 420, § 6; Laws, 2010, ch. 506, § 14, eff from and after July 1, 2010.

Amendment Notes — The 2010 amendment, throughout (a) and in (b), substituted "another record" for "another writing."

§ 75-3-108. Payable on demand or at definite time.

JUDICIAL DECISIONS

III. DECISIONS UNDER CURRENT LAW.

18. In general.

III. DECISIONS UNDER CURRENT LAW.

18. In general.

Because a promise is a note under Title 75, Chapter 3, of the Mississippi Code Annotated, the reference in Miss. Code Ann. § 75-3-118(a) to "a note payable at a definite time" is to a promise payable at a definite time, in other words, a promissory note. Jordan v. BancorpSouth Bank, 964 So. 2d 1205 (Miss. Ct. App. 2007).

Complaint alleging violations of Miss. Code Ann. § 75-3A-108 concerning forced insurance for loans accrued on the dates of plaintiff borrower's disclosure statement, and absent evidence of an affirmative act preventing the borrower from discovering the claims, the three-year Mississippi statute of limitations, Miss. Code Ann. § 15-1-49(1) was not tolled and the claims were time-barred. Johnson v. Citifinancial, Inc., — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 22527 (S.D. Miss. Feb. 7, 2003).

§ 75-3-109. Payable to bearer or to order.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1. Negotiable instrument.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1. Negotiable instrument.

Promissory notes were not negotiable instruments and, thus, not subject to a six-year statute of limitations, where they did not contain the language "payable to the order of" or were not made payable to an identified payee or order. Whitaker v. Limeco Corp., 32 So. 3d 429 (Miss. 2010).

§ 75-3-110. Identification of person to whom instrument is payable.

JUDICIAL DECISIONS

II. DECISIONS UNDER FORMER UCC § 75-3-117.

11. In general.

II. DECISIONS UNDER FORMER UCC § 75-3-117.

11. In general.

Miss. Code Ann. § 75-3-110 does not address the obligations of a bank in determining what to do with a check or other negotiable instrument made out to a payee in trust; therefore, a trial court did not err by determining that a bank was not negligent by failing to intervene in a fraud perpetrated by the wiring of funds from a trust account where the bank had no actual knowledge of the fraud. Holifield v. BancorpSouth, Inc., 891 So. 2d 241 (Miss. Ct. App. 2004).

§ 75-3-113. Date of instrument.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1. Non-negotiable instruments.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1. Non-negotiable instruments.

Even though the provisions of the Uniform Commercial Code did not apply to a non-negotiable certificate of deposit (CD), Miss. Code Ann. § 75-3-113(a) provided persuasive authority in the determination that the backdating of the CD was appropriate; the backdating instructions here did not affect the date of the actual issuance of the CD. DeJean v. DeJean, 982 So. 2d 443 (Miss. Ct. App. 2007), writ of certiorari denied by 981 So. 2d 298, 2008 Miss. LEXIS 236 (Miss. 2008).

§ 75-3-116. Joint and several liability; contribution.

(a) Except as otherwise provided in the instrument, two (2) or more persons who have the same liability on an instrument as makers, drawers, acceptors, indorsers who indorse as joint payees, or anomalous indorsers are jointly and severally liable in the capacity in which they sign.

(b) Except as provided in Section 75-3-419(f) or by agreement of the affected parties, a party having joint and several liability who pays the instrument is entitled to receive from any party having the same joint and several liability contribution in accordance with applicable law.

SOURCES: Former § 75-3-116: Codes, 1942, § 41A:3-116; Laws, 1966, ch. 316, § 3-116; Laws, 1992, ch. 420, § 16; Laws, 2010, ch. 506, § 15, eff from and after July 1, 2010.

Amendment Notes — The 2010 amendment substituted "Section 75-3-419(f)" for "Section 75-3-419(e)" in (b);and deleted former (c), which provided, "Discharge of one (1) party having joint and several liability by a person entitled to enforce the instrument does not affect the right under subsection (b) of a party having the same joint and several liability to receive contribution from the party discharged."

§ 75-3-118. Statute of limitations.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1. Generally.
2. Applicability.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1. Generally.

In a dispute involving a promissory note, an issue of which statute of limitations applied was not decided because the creditor never filed suit to foreclose on the note, and the creditor never filed collection on the note. Chimento v. Fuller, 965 So. 2d 668 (Miss. 2007).

Because a promise is a note under Title 75, Chapter 3, of the Mississippi Code Annotated, the reference in Miss. Code Ann. § 75-3-118(a) to "a note payable at a definite time" is to a promise payable at a definite time, in other words, a promissory note. Jordan v. BancorpSouth Bank, 964 So. 2d 1205 (Miss. Ct. App. 2007).

Holder was properly granted summary judgment because its 2005 action to recover funds due under the maker's promissory note, which was dated on September 7, 1999, was timely filed under the six-year statute of limitations in Miss. Code Ann. § 75-3-118(a), and the general three-year limitations period in Miss. Code Ann. § 15-1-49 did not apply. Jordan v. BancorpSouth Bank, 964 So. 2d 1205 (Miss. Ct. App. 2007).

Where plaintiff did not file his action to recover funds after defendant's check to him bounced until almost four years after the check was first dishonored, plaintiff's action was barred by the statute of limitations in Miss. Code Ann. § 75-3-118(c). Bryan v. Aron, 941 So. 2d 831 (Miss. Ct. App. 2006), writ of certiorari denied en banc, sub nomine Russell v. Aron, 942 So. 2d 164, 2006 Miss. LEXIS 648 (Miss. 2006).

2. Applicability.

Recap statements prepared by lender did not satisfy the definition of a negotiable instrument because first, there was no written document that contained an unconditional promise by the borrowers to pay him; second, with the exception of the checks written by the lender to either one of the borrower's or her husband's furniture company, none of the documents that the lender alleged to comprise a written demand note contained the words "payable to bearer" or "payable to order." Lacking these things, the lender's claims were not claims upon negotiable instruments so as to be governed by the Uniform Commercial Code and covered under the six-year statute of limitations pursuant to Miss. Code Ann. § 75-3-118(b). Morgan v. Stevens, 989 So. 2d 482 (Miss. Ct. App. 2008).

§ 75-3-119. Notice of right to defend action.

In an action for breach of an obligation for which a third person is answerable over pursuant to this chapter or Chapter 4, the defendant may give the third person notice of the litigation in a record, and the person notified may then give similar notice to any other person who is answerable over. If the notice states (i) that the person notified may come in and defend and (ii) that failure to do so will bind the person notified in an action later brought by the person giving the notice as to any determination of fact common to the two (2) litigations, the person notified is so bound unless after seasonable receipt of the notice the person notified does come in and defend.

SOURCES: Former § 75-3-119: Codes, 1942, § 41A:3-119; Laws, 1966, ch. 316, § 3-119, eff March 31, 1968; Laws, 1992, ch. 420, § 19; Laws, 2010, ch. 506, § 16, eff from and after July 1, 2010.

Amendment Notes — The 2010 amendment, in the first sentence, deleted "written" preceding "notice of litigation" and inserted "in a record" thereafter.

Part 2.

Negotiation, Transfer, and Indorsement.

§ 75-3-201. Negotiation.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

3. Endorsement clause.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

3. Endorsement clause.

Endorsement clause appearing on a non-negotiable certificate of deposit (CD) is placed for the purpose of mitigating the risk that the issuing bank may make payment to someone not entitled to payment. The clauses are not meant to protect a depositor against withdrawals by a co-depositor and may be waived by the bank; therefore, even though endorsements were required for a negotiable instrument, this was not required for a non-negotiable CD. DeJean v. DeJean, 982 So. 2d 443 (Miss. Ct. App. 2007), writ of certiorari denied by 981 So. 2d 298, 2008 Miss. LEXIS 236 (Miss. 2008).

Part 3.

Enforcement of Instruments.

Sec.

75-3-305. Defenses and claims in recoupment.

75-3-309. Enforcement of lost, destroyed, or stolen instrument.

75-3-312. Lost, destroyed, or stolen cashier's check, teller's check, or certified check.

§ 75-3-301. Person entitled to enforce instrument.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

3. Holder in due course.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

3. Holder in due course.

Where an assignee bought a note and deed of trust before defendant borrower filed suit alleging fraud by the funding lender, the assignee and plaintiff, its loan servicer, were holders in due course entitled to sue on the note under Miss. Code Ann. §§ 75-3-301, 75-3-302(a). Ocwen Loan Servicing, LLC v. Branaman, 554 F. Supp. 2d 645 (N.D. Miss. 2008).

§ 75-3-302. Holder in due course.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1. In general.
3. Holder in due course.

II. DECISIONS UNDER FORMER UCC § 75-3-302.

11. In general.
18. Good faith and notice, generally.
20. —Banking transactions.
22. — —Acceptance of instruments without proper indorsement.
23. — —Knowledge of underlying nature of conduct resulting in defenses.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1. In general.

Admissions agreement between decedent and nursing home contained unconscionable provisions, and weaved unconscionable nonforum terms into the arbitration provision, Miss. Code Ann. § 75-2-302; were the court to assume the contract was valid, the contested agreement to arbitrate would be unenforceable, as the forum putatively agreed upon was unavailable. Covenant Health & Rehab. of Picayune, LP v. Estate of Moulds, 14 So. 3d 695 (Miss. 2009).

3. Holder in due course.

Where an assignee bought a note and deed of trust before defendant borrower filed suit alleging fraud by the funding lender, the assignee and plaintiff, its loan servicer, were holders in due course entitled to sue on the note under Miss. Code Ann. §§ 75-3-301, -75-3-302(a). Ocwen Loan Servicing, LLC v. Branaman, 554 F. Supp. 2d 645 (N.D. Miss. 2008).

II. DECISIONS UNDER FORMER UCC § 75-3-302.

11. In general.

Mortgage company's assignment of the loans to the bank were valid and as such the bank was a holder in due course. Carson v. McNeal, 375 F. Supp. 2d 509 (S.D. Miss. 2005).

18. Good faith and notice, generally.

20. —Banking transactions.

22. — —Acceptance of instruments without proper indorsement.

In a case involving deposits made by a customer into a trust and operating account during the commission of a fraud, a bank did not lose its holder in due course status, despite the varying endorsements made by the customer, pursuant to Miss. Code Ann. §§ 75-4-205(1), 75-3-302(a); the endorsements were not defective based on a failure to reference the customer's status as a trustee. Holifield v. BancorpSouth, Inc., 891 So. 2d 241 (Miss. Ct. App. 2004).

23. — —Knowledge of underlying nature of conduct resulting in defenses.

In a case alleging predatory lending practices, a creditor was not liable for the alleged improprieties of a predecessor in interest because it was a holder in due course; there was uncontested evidence that the creditor purchased the rights to a promissory note for value, in good faith, and without notice of the impropriety. Stuckey v. Provident Bank, 912 So. 2d 859 (Miss. 2005).

§ 75-3-305. Defenses and claims in recoupment.

(a) Except as otherwise provided in this section, the right to enforce the obligation of a party to pay an instrument is subject to the following:

(1) A defense of the obligor based on (i) infancy of the obligor to the extent it is a defense to a simple contract, (ii) duress, lack of legal capacity, or illegality of the transaction which, under other law, nullifies the obligation

of the obligor, (iii) fraud that induced the obligor to sign the instrument with neither knowledge nor reasonable opportunity to learn of its character or its essential terms, or (iv) discharge of the obligor in insolvency proceedings;

(2) A defense of the obligor stated in another section of this chapter or a defense of the obligor that would be available if the person entitled to enforce the instrument were enforcing a right to payment under a simple contract; and

(3) A claim in recoupment of the obligor against the original payee of the instrument if the claim arose from the transaction that gave rise to the instrument; but the claim of the obligor may be asserted against a transferee of the instrument only to reduce the amount owing on the instrument at the time the action is brought.

(b) The right of a holder in due course to enforce the obligation of a party to pay the instrument is subject to defenses of the obligor stated in subsection (a)(1), but is not subject to defenses of the obligor stated in subsection (a)(2) or claims in recoupment stated in subsection (a)(3) against a person other than the holder.

(c) Except as stated in subsection (d), in an action to enforce the obligation of a party to pay the instrument, the obligor may not assert against the person entitled to enforce the instrument a defense, claim in recoupment, or claim to the instrument (Section 75-3-306) of another person, but the other person's claim to the instrument may be asserted by the obligor if the other person is joined in the action and personally asserts the claim against the person entitled to enforce the instrument. An obligor is not obliged to pay the instrument if the person seeking enforcement of the instrument does not have rights of a holder in due course and the obligor proves that the instrument is a lost or stolen instrument.

(d) In an action to enforce the obligation of an accommodation party to pay an instrument, the accommodation party may assert against the person entitled to enforce the instrument any defense or claim in recoupment under subsection (a) that the accommodated party could assert against the person entitled to enforce the instrument, except the defenses of discharge in insolvency proceedings, infancy, and lack of legal capacity.

SOURCES: Former § 75-3-305: Codes, 1942, § 41A:3-305; Laws, 1966, ch. 316, § 3-305; Laws, 1992, ch. 420, § 31; Laws, 2010, ch. 506, § 17, eff from and after July 1, 2010.

Amendment Notes — The 2010 amendment substituted "Except as otherwise provided in this section" for "Except as stated in subsection (b)" in the introductory paragraph in (a).

JUDICIAL DECISIONS

1. Holder in due course.

In a case alleging predatory lending practices, a creditor was not liable for the alleged improprieties of a predecessor in interest because it was a holder in due course; there was uncontested evidence that the creditor purchased the rights to a promissory note for value, in good faith,

and without notice of the impropriety.
Stuckey v. Provident Bank, 912 So. 2d 859 (Miss. 2005).

§ 75-3-309. Enforcement of lost, destroyed, or stolen instrument.

(a) A person not in possession of an instrument is entitled to enforce the instrument if:

(1) The person seeking to enforce the instrument:

(i) Was entitled to enforce the instrument when loss of possession occurred; or

(ii) Has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred;

(2) The loss of possession was not the result of a transfer by the person or a lawful seizure; and

(3) The person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

(b) A person seeking enforcement of an instrument under subsection (a) must prove the terms of the instrument and the person's right to enforce the instrument. If that proof is made, Section 75-3-308 applies to the case as if the person seeking enforcement had produced the instrument. The court may not enter judgment in favor of the person seeking enforcement unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument. Adequate protection may be provided by any reasonable means.

SOURCES: Laws, 1992, ch. 420, § 35; Laws, 2010, ch. 506, § 18, eff from and after July 1, 2010.

Amendment Notes — The 2010 amendment rewrote (a).

§ 75-3-312. Lost, destroyed, or stolen cashier's check, teller's check, or certified check.

(a) In this section:

(1) "Check" means a cashier's check, teller's check, or certified check.

(2) "Claimant" means a person who claims the right to receive the amount of a cashier's check, teller's check, or certified check that was lost, destroyed, or stolen.

(3) "Declaration of loss" means a statement, made in a record under penalty of perjury, to the effect that (i) the declarer lost possession of a check, (ii) the declarer is the drawer or payee of the check, in the case of a certified check, or the remitter or payee of the check, in the case of a cashier's check or teller's check, (iii) the loss of possession was not the result of a transfer by

the declarer or a lawful seizure, and (iv) the declarer cannot reasonably obtain possession of the check because the check was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

(4) "Obligated bank" means the issuer of a cashier's check or teller's check or the acceptor of a certified check.

(b) A claimant may assert a claim to the amount of a check by a communication to the obligated bank describing the check with reasonable certainty and requesting payment of the amount of the check, if (i) the claimant is the drawer or payee of a certified check or the remitter or payee of a cashier's check or teller's check, (ii) the communication contains or is accompanied by a declaration of loss of the claimant with respect to the check, (iii) the communication is received at a time and in a manner affording the bank a reasonable time to act on it before the check is paid, and (iv) the claimant provides reasonable identification if requested by the obligated bank. Delivery of a declaration of loss is a warranty of the truth of the statements made in the declaration. If a claim is asserted in compliance with this subsection, the following rules apply:

(1) The claim becomes enforceable at the later of (i) the time the claim is asserted, or (ii) the ninetieth day following the date of the check, in the case of a cashier's check or teller's check, or the ninetieth day following the date of acceptance, in the case of a certified check.

(2) Until the claim becomes enforceable, it has no legal effect and the obligated bank may pay the check or, in the case of a teller's check, may permit the drawee to pay the check. Payment to a person entitled to enforce the check discharges all liability of the obligated bank with respect to the check.

(3) If the claim becomes enforceable before the check is presented for payment, the obligated bank is not obliged to pay the check.

(4) When the claim becomes enforceable, the obligated bank becomes obliged to pay the amount of the check to the claimant if payment of the check has not been made to a person entitled to enforce the check. Subject to Section 75-4-302(a)(1), payment to the claimant discharges all liability of the obligated bank with respect to the check.

(c) If the obligated bank pays the amount of a check to a claimant under subsection (b)(4) and the check is presented for payment by a person having rights of a holder in due course, the claimant is obliged to (i) refund the payment to the obligated bank if the check is paid, or (ii) pay the amount of the check to the person having rights of a holder in due course if the check is dishonored.

(d) If a claimant has the right to assert a claim under subsection (b) and is also a person entitled to enforce a cashier's check, teller's check, or certified check which is lost, destroyed, or stolen, the claimant may assert rights with respect to the check either under this section or Section 75-3-309.

SOURCES: Laws, 1992, ch. 420, § 38; Laws, 2010, ch. 506, § 19, eff from and after July 1, 2010.

Amendment Notes — The 2010 amendment substituted "a statement, made in a record under penalty of perjury" for "a written statement, made under penalty of perjury" in (3).

PART 4.

LIABILITY OF PARTIES.

SEC.

75-3-415. Obligation of indorser.
75-3-416. Transfer warranties.
75-3-417. Presentment warranties.
75-3-419. Instruments signed for accommodation.

§ 75-3-403. Unauthorized signature.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

2. Payment upon forged signature; liability.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

2. Payment upon forged signature; liability.

Bank was not entitled to summary judgment on its claim that a debtor was liable for the unpaid balance of a loan her husband obtained by forging the debtor's signature on loan documents two years before she declared Chapter 7 bankruptcy. Although the debtor did not notify authorities that a crime occurred and made payments on the debt, there was evidence in the record which showed that the debtor's actions were not truly voluntary, which precluded summary judgment. Hancock Bank v. Bates (In re Bates), — Bankr. —, 2010 Bankr. LEXIS 1780 (Bankr. S.D. Miss. May 27, 2010).

§ 75-3-412. Obligation of issuer of note or cashier's check.

JUDICIAL DECISIONS

II. DECISIONS UNDER FORMER UCC § 75-3-413.

11. In general.

II. DECISIONS UNDER FORMER UCC § 75-3-413.

11. In general.

In a case involving a dispute over loans for three trucks, a borrower's liability as the maker was unconditional under Miss. Code Ann. § 75-3-412; therefore, a trial court erred by entering a partial equitable judgment in his favor when it determined that he was not responsible for the balance of a loan that was still outstanding based on a car dealer's fraud. Trustmark Nat'l Bank v. Barnard, 930 So. 2d 1281 (Miss. Ct. App. 2006).

§ 75-3-415. Obligation of indorser.

(a) Subject to subsections (b), (c), and (d) and to Section 75-3-419(d), if an instrument is dishonored, an indorser is obliged to pay the amount due on the

instrument (i) according to the terms of the instrument at the time it was indorsed, or (ii) if the indorser indorsed an incomplete instrument, according to its terms when completed, to the extent stated in Sections 75-3-115 and 75-3-407. The obligation of the indorser is owed to a person entitled to enforce the instrument or to a subsequent indorser who paid the instrument under this section.

(b) If an indorsement states that it is made "without recourse" or otherwise disclaims liability of the indorser, the indorser is not liable under subsection (a) to pay the instrument.

(c) If notice of dishonor of an instrument is required by Section 75-3-503 and notice of dishonor complying with that section is not given to an indorser, the liability of the indorser under subsection (a) is discharged.

(d) If a draft is accepted by a bank after an indorsement is made, the liability of the indorser under subsection (a) is discharged.

SOURCES: Former § 75-3-415: Codes, 1942, § 41A:3-415; Laws, 1966, ch. 316, § 3-415; Laws, 1992, ch. 420, § 53; Laws, 2010, ch. 506, § 20, eff from and after July 1, 2010.

Amendment Notes — The 2010 amendment deleted (e), which read: "If an indorser of a check is liable under subsection (a) and the check is not presented for payment, or given to a depositary bank for collection, within thirty (30) days after the day the indorsement was made, the liability of the indorser under subsection (a) is discharged."

§ 75-3-416. Transfer warranties.

(a) A person who transfers an instrument for consideration warrants to the transferee and, if the transfer is by indorsement, to any subsequent transferee that:

(1) The warrantor is a person entitled to enforce the instrument;

(2) All signatures on the instrument are authentic and authorized;

(3) The instrument has not been altered;

(4) The instrument is not subject to a defense or claim in recoupment of any party which can be asserted against the warrantor;

(5) The warrantor has no knowledge of any insolvency proceeding commenced with respect to the maker or acceptor or, in the case of an unaccepted draft, the drawer; and

(6) With respect to a remotely created check, that the person on whose account the remotely created check is drawn authorized the issuance of the check in the amount stated on the check and to the payee stated on the check.

(b) A person to whom the warranties under subsection (a) are made and who took the instrument in good faith may recover from the warrantor as damages for breach of warranty an amount equal to the loss suffered as a result of the breach, but not more than the amount of the instrument plus expenses and loss of interest incurred as a result of the breach.

(c) The warranties stated in subsection (a) cannot be disclaimed with respect to checks. Unless notice of a claim for breach of warranty is given to the

warrantor within thirty (30) days after the claimant has reason to know of the breach and the identity of the warrantor, the liability of the warrantor under subsection (b) is discharged to the extent of any loss caused by the delay in giving notice of the claim.

(d) A cause of action for breach of warranty under this section accrues when the claimant has reason to know of the breach.

SOURCES: Former § 75-3-416: Codes, 1942, § 41A:3-416; Laws, 1966, ch. 316, § 3-416; Laws, 1992, ch. 420, § 54; Laws, 2010, ch. 506, § 21, eff from and after July 1, 2010.

Amendment Notes — The 2010 amendment added (a)(6); and made minor stylistic changes.

§ 75-3-417. Presentment warranties.

(a) If an unaccepted draft is presented to the drawee for payment or acceptance and the drawee pays or accepts the draft, (i) the person obtaining payment or acceptance, at the time of presentment, and (ii) a previous transferor of the draft, at the time of transfer, warrant to the drawee making payment or accepting the draft in good faith that:

(1) The warrantor is, or was, at the time the warrantor transferred the draft, a person entitled to enforce the draft or authorized to obtain payment or acceptance of the draft on behalf of a person entitled to enforce the draft;

(2) The draft has not been altered;

(3) The warrantor has no knowledge that the signature of the drawer of the draft is unauthorized; and

(4) With respect to a remotely created check, that the person on whose account the remotely created check is drawn authorized the issuance of the check in the amount stated on the check and to the payee stated on the check.

(b) A drawee making payment may recover from any warrantor damages for breach of warranty equal to the amount paid by the drawee less the amount the drawee received or is entitled to receive from the drawer because of the payment. In addition, the drawee is entitled to compensation for expenses and loss of interest resulting from the breach. The right of the drawee to recover damages under this subsection is not affected by any failure of the drawee to exercise ordinary care in making payment. If the drawee accepts the draft, breach of warranty is a defense to the obligation of the acceptor. If the acceptor makes payment with respect to the draft, the acceptor is entitled to recover from any warrantor for breach of warranty the amounts stated in this subsection.

(c) If a drawee asserts a claim for breach of warranty under subsection (a) based on an unauthorized indorsement of the draft or an alteration of the draft, the warrantor may defend by proving that the indorsement is effective under Section 75-3-404 or 75-3-405 or the drawer is precluded under Section 75-3-406 or 75-4-406 from asserting against the drawee the unauthorized indorsement

or alteration. If a drawee asserts a claim for breach of warranty under subsection (a)(4), the warrantor may defend by proving that the person on whose account the remotely created check is drawn is precluded under Section 75-4-406, as applicable, from asserting against the drawee the unauthorized issuance of the check.

(d) If (i) a dishonored draft is presented for payment to the drawer or an indorser or (ii) any other instrument is presented for payment to a party obliged to pay the instrument, and (iii) payment is received, the following rules apply:

(1) The person obtaining payment and a prior transferor of the instrument warrant to the person making payment in good faith that the warrantor is, or was, at the time the warrantor transferred the instrument, a person entitled to enforce the instrument or authorized to obtain payment on behalf of a person entitled to enforce the instrument.

(2) The person making payment may recover from any warrantor for breach of warranty an amount equal to the amount paid plus expenses and loss of interest resulting from the breach.

(e) The warranties stated in subsections (a) and (d) cannot be disclaimed with respect to checks. Unless notice of a claim for breach of warranty is given to the warrantor within thirty (30) days after the claimant has reason to know of the breach and the identity of the warrantor, the liability of the warrantor under subsection (b) or (d) is discharged to the extent of any loss caused by the delay in giving notice of the claim.

(f) A cause of action for breach of warranty under this section accrues when the claimant has reason to know of the breach.

SOURCES: Former § 75-3-417: Codes, 1942, § 41A:3-417; Laws, 1966, ch. 316, § 3-417; Laws, 1992, ch. 420, § 55; Laws, 2010, ch. 506, § 22, eff from and after July 1, 2010.

Amendment Notes — The 2010 amendment, in (a), added (4), and made minor stylistic changes; and added the last sentence in (c).

§ 75-3-419. Instruments signed for accommodation.

(a) If an instrument is issued for value given for the benefit of a party to the instrument ("accommodated party") and another party to the instrument ("accommodation party") signs the instrument for the purpose of incurring liability on the instrument without being a direct beneficiary of the value given for the instrument, the instrument is signed by the accommodation party "for accommodation."

(b) An accommodation party may sign the instrument as maker, drawer, acceptor, or indorser and, subject to subsection (d), is obliged to pay the instrument in the capacity in which the accommodation party signs. The obligation of an accommodation party may be enforced notwithstanding any statute of frauds and whether or not the accommodation party receives consideration for the accommodation.

(c) A person signing an instrument is presumed to be an accommodation party and there is notice that the instrument is signed for accommodation if the signature is an anomalous indorsement or is accompanied by words indicating that the signer is acting as surety or guarantor with respect to the obligation of another party to the instrument. Except as provided in Section 75-3-605, the obligation of an accommodation party to pay the instrument is not affected by the fact that the person enforcing the obligation had notice when the instrument was taken by that person that the accommodation party signed the instrument for accommodation.

(d) If the signature of a party to an instrument is accompanied by words indicating unambiguously that the party is guaranteeing collection rather than payment of the obligation of another party to the instrument, the signer is obliged to pay the amount due on the instrument to a person entitled to enforce the instrument only if (i) execution of judgment against the other party has been returned unsatisfied, (ii) the other party is insolvent or in an insolvency proceeding, (iii) the other party cannot be served with process, or (iv) it is otherwise apparent that payment cannot be obtained from the other party.

(e) If the signature of a party to an instrument is accompanied by words indicating that the party guarantees payment or the signer signs the instrument as an accommodation party in some other manner that does not unambiguously indicate an intention to guarantee collection rather than payment, the signer is obliged to pay the amount due on the instrument to a person entitled to enforce the instrument in the same circumstances as the accommodated party would be obliged, without prior resort to the accommodated party by the person entitled to enforce the instrument.

(f) An accommodation party who pays the instrument is entitled to reimbursement from the accommodated party and is entitled to enforce the instrument against the accommodated party. In proper circumstances, an accommodation party may obtain relief that requires the accommodated party to perform its obligations on the instrument. An accommodated party who pays the instrument has no right of recourse against, and is not entitled to contribution from, an accommodation party.

SOURCES: Former § 75-3-419: Codes, 1942, § 41A:3-419; Laws, 1966, ch. 316, § 3-419; Laws, 1992, ch. 420, § 57; Laws, 2010, ch. 506, § 23, eff from and after July 1, 2010.

Amendment Notes — The 2010 amendment added (e); redesignated former (e) as (f); and added the second sentence of (f).

§ 75-3-420. Conversion of instrument.

RESEARCH REFERENCES

ALR. Drawer's right of recovery against depositary bank that accepts check with missing indorsement or in violation of restrictive covenant. 104 A.L.R.5th 459.

Successful negotiation of commercial transaction as element of state offense of credit card fraud or false pretense in use of credit card. 106 A.L.R.5th 701.

Part 5.

Dishonor.

§ 75-3-501. Presentment.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1. Presentment.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1. Presentment.

Plaintiff presented defendant's check to the bank when he deposited it in his account to obtain the amount of the funds represented on the front of the check. Bryan v. Aron, 941 So. 2d 831 (Miss. Ct. App. 2006), writ of certiorari denied en banc, sub nomine Russell v. Aron, 942 So. 2d 164, 2006 Miss. LEXIS 648 (Miss. 2006).

§ 75-3-502. Dishonor.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1. Dishonor.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1. Dishonor.

Defendant's check to plaintiff was dishonored where plaintiff presented the check to the bank on four separate occasions, and on each attempt the check was returned for insufficient funds. Bryan v. Aron, 941 So. 2d 831 (Miss. Ct. App. 2006), writ of certiorari denied en banc, sub nomine Russell v. Aron, 942 So. 2d 164, 2006 Miss. LEXIS 648 (Miss. 2006).

Part 6.

Discharge and payment.

Sec.

75-3-602. Payment.
75-3-604. Discharge by cancellation or renunciation.
75-3-605. Discharge of secondary obligors.

§ 75-3-602. Payment.

(a) Subject to subsection (e), an instrument is paid to the extent payment is made by or on behalf of a party obliged to pay the instrument, and to a person entitled to enforce the instrument.

(b) Subject to subsection (e), a note is paid to the extent payment is made by or on behalf of a party obliged to pay the note to a person that formerly was

entitled to enforce the note only if at the time of the payment the party obliged to pay has not received adequate notification that the note has been transferred and that payment is to be made to the transferee. A notification is adequate only if it is signed by the transferor or the transferee; reasonably identifies the transferred note; and provides an address at which payments subsequently are to be made. Upon request made in a record, a transferee shall seasonably furnish reasonable proof that the note has been transferred.

(c) Subject to subsection (e), to the extent of a payment under subsections (a) and (b), the obligation of the party obliged to pay the instrument is discharged even though payment is made with knowledge of a claim to the instrument under Section 75-3-306 by another person.

(d) Subject to subsection (e), a transferee, or any party that has acquired rights in the instrument directly or indirectly from a transferee, including any such party that has rights as a holder in due course, is deemed to have notice of any payment that is made under subsection (b) after the date that the note is transferred to the transferee but before the party obliged to pay the note receives adequate notification of the transfer.

(e) The obligation of a party to pay the instrument is not discharged under subsections (a) through (d) if:

(1) A claim to the instrument under Section 75-3-306 is enforceable against the party receiving payment and (i) payment is made with knowledge by the payor that payment is prohibited by injunction or similar process of a court of competent jurisdiction, or (ii) in the case of an instrument other than a cashier's check, teller's check, or certified check, the party making payment accepted, from the person having a claim to the instrument, indemnity against loss resulting from refusal to pay the person entitled to enforce the instrument; or

(2) The person making payment knows that the instrument is a stolen instrument and pays a person it knows is in wrongful possession of the instrument.

(f) As used in this section, "signed," with respect to a record that is not a writing, includes the attachment to or logical association with the record of an electronic symbol, sound, or process with the present intent to adopt or accept the record.

SOURCES: Former § 75-3-602: Codes, 1942, § 41A:3-602; Laws, 1966, ch. 316, § 3-602; Laws, 1992, ch. 420, § 65; Laws, 2010, ch. 506, § 24, eff from and after July 1, 2010.

Amendment Notes — The 2010 amendment rewrote the section.

§ 75-3-604. Discharge by cancellation or renunciation.

(a) A person entitled to enforce an instrument, with or without consideration, may discharge the obligation of a party to pay the instrument (i) by an intentional voluntary act, such as surrender of the instrument to the party, destruction, mutilation, or cancellation of the instrument, cancellation or

striking out of the party's signature, or the addition of words to the instrument indicating discharge, or (ii) by agreeing not to sue or otherwise renouncing rights against the party by a signed record.

(b) Cancellation or striking out of an indorsement pursuant to subsection (a) does not affect the status and rights of a party derived from the indorsement.

(c) In this section, "signed," with respect to a record that is not a writing, includes the attachment to or logical association with the record of an electronic symbol, sound, or process with the present intent to adopt or accept the record.

SOURCES: Former § 75-3-604: Codes, 1942, § 41A:3-604; Laws, 1966, ch. 316, § 3-604; Laws, 1992, ch. 420, § 67; Laws, 2010, ch. 506, § 25, eff from and after July 1, 2010.

Amendment Notes — The 2010 amendment substituted "by a signed record" for "by a signed writing" at the end of (a); and added (c).

§ 75-3-605. Discharge of secondary obligors.

(a) If a person entitled to enforce an instrument releases the obligation of a principal obligor in whole or in part, and another party to the instrument is a secondary obligor with respect to the obligation of that principal obligor, the following rules apply:

(1) Any obligations of the principal obligor to the secondary obligor with respect to any previous payment by the secondary obligor are not affected. Unless the terms of the release preserve the secondary obligor's recourse, the principal obligor is discharged, to the extent of the release, from any other duties to the secondary obligor under this article.

(2) Unless the terms of the release provide that the person entitled to enforce the instrument retains the right to enforce the instrument against the secondary obligor, the secondary obligor is discharged to the same extent as the principal obligor from any unperformed portion of its obligation on the instrument. If the instrument is a check and the obligation of the secondary obligor is based on an indorsement of the check, the secondary obligor is discharged without regard to the language or circumstances of the discharge or other release.

(3) If the secondary obligor is not discharged under paragraph (2), the secondary obligor is discharged to the extent of the value of the consideration for the release, and to the extent that the release would otherwise cause the secondary obligor a loss.

(b) If a person entitled to enforce an instrument grants a principal obligor an extension of the time at which one or more payments are due on the instrument and another party to the instrument is a secondary obligor with respect to the obligation of that principal obligor, the following rules apply:

(1) Any obligations of the principal obligor to the secondary obligor with respect to any previous payment by the secondary obligor are not affected. Unless the terms of the extension preserve the secondary obligor's recourse,

the extension correspondingly extends the time for performance of any other duties owed to the secondary obligor by the principal obligor under this article.

(2) The secondary obligor is discharged to the extent that the extension would otherwise cause the secondary obligor a loss.

(3) To the extent that the secondary obligor is not discharged under paragraph (2), the secondary obligor may perform its obligations to a person entitled to enforce the instrument as if the time for payment had not been extended or, unless the terms of the extension provide that the person entitled to enforce the instrument retains the right to enforce the instrument against the secondary obligor as if the time for payment had not been extended, treat the time for performance of its obligations as having been extended correspondingly.

(c) If a person entitled to enforce an instrument agrees, with or without consideration, to a modification of the obligation of a principal obligor other than a complete or partial release or an extension of the due date and another party to the instrument is a secondary obligor with respect to the obligation of that principal obligor, the following rules apply:

(1) Any obligations of the principal obligor to the secondary obligor with respect to any previous payment by the secondary obligor are not affected. The modification correspondingly modifies any other duties owed to the secondary obligor by the principal obligor under this article.

(2) The secondary obligor is discharged from any unperformed portion of its obligation to the extent that the modification would otherwise cause the secondary obligor a loss.

(3) To the extent that the secondary obligor is not discharged under paragraph (2), the secondary obligor may satisfy its obligation on the instrument as if the modification had not occurred, or treat its obligation on the instrument as having been modified correspondingly.

(d) If the obligation of a principal obligor is secured by an interest in collateral, another party to the instrument is a secondary obligor with respect to that obligation, and a person entitled to enforce the instrument impairs the value of the interest in collateral, the obligation of the secondary obligor is discharged to the extent of the impairment. The value of an interest in collateral is impaired to the extent the value of the interest is reduced to an amount less than the amount of the recourse of the secondary obligor, or the reduction in value of the interest causes an increase in the amount by which the amount of the recourse exceeds the value of the interest. For purposes of this subsection, impairing the value of an interest in collateral includes failure to obtain or maintain perfection or recordation of the interest in collateral, release of collateral without substitution of collateral of equal value or equivalent reduction of the underlying obligation, failure to perform a duty to preserve the value of collateral owed, under Article 9 or other law, to a debtor or other person secondarily liable, and failure to comply with applicable law in disposing of or otherwise enforcing the interest in collateral.

(e) A secondary obligor is not discharged under subsection (a)(3), (b), (c), or (d) unless the person entitled to enforce the instrument knows that the

person is a secondary obligor or has notice under Section 75-3-419(c) that the instrument was signed for accommodation.

(f) A secondary obligor is not discharged under this section if the secondary obligor consents to the event or conduct that is the basis of the discharge, or the instrument or a separate agreement of the party provides for waiver of discharge under this section specifically or by general language indicating that parties waive defenses based on suretyship or impairment of collateral. Unless the circumstances indicate otherwise, consent by the principal obligor to an act that would lead to a discharge under this section constitutes consent to that act by the secondary obligor if the secondary obligor controls the principal obligor or deals with the person entitled to enforce the instrument on behalf of the principal obligor.

(g) A release or extension preserves a secondary obligor's recourse if the terms of the release or extension provide that:

(1) The person entitled to enforce the instrument retains the right to enforce the instrument against the secondary obligor; and

(2) The recourse of the secondary obligor continues as if the release or extension had not been granted.

(h) Except as otherwise provided in subsection (i), a secondary obligor asserting discharge under this section has the burden of persuasion both with respect to the occurrence of the acts alleged to harm the secondary obligor and loss or prejudice caused by those acts.

(i) If the secondary obligor demonstrates prejudice caused by an impairment of its recourse, and the circumstances of the case indicate that the amount of loss is not reasonably susceptible of calculation or requires proof of facts that are not ascertainable, it is presumed that the act impairing recourse caused a loss or impairment equal to the liability of the secondary obligor on the instrument. In that event, the burden of persuasion as to any lesser amount of the loss is on the person entitled to enforce the instrument.

SOURCES: Former § 75-3-605: Codes, 1942, § 41A:3-605; Laws, 1966, ch. 316, § 3-605; Laws, 1992, ch. 420, § 68; Laws, 2010, ch. 506, § 26, eff from and after July 1, 2010.

Amendment Notes — The 2010 amendment rewrote the section.

JUDICIAL DECISIONS

II. DECISIONS UNDER FORMER UCC § 75-3-606.

1. Discharge not appropriate.

II. DECISIONS UNDER FORMER UCC § 75-3-606.

1. Discharge not appropriate.

In a case involving a dispute over loans for three trucks, a borrower's liability as the maker was unconditional under Miss. Code Ann. § 75-3-412; therefore, a trial court erred by entering a partial equitable judgment in his favor when it determined that he was not responsible for the balance of a loan that was still outstanding based on a car dealer's fraud. Trustmark Nat'l Bank v. Barnard, 930 So. 2d 1281 (Miss. Ct. App. 2006).

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